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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 68

WILLIAM HELIS, PETITIONER,

vs.

**MRS. ITASCA KINNEY WARD, AS EXECUTRIX OF
THE ESTATE OF BRYAN WARD, DECEASED,
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 26, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.



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UNITED STATES OF AMERICA,

**DISTRICT COURT OF THE UNITED STATES, EAST-
ERN DISTRICT OF LOUISIANA, NEW ORLEANS
DIVISION.**

No. 292 (Equity).

WILLIAM HELIS,

versus

BRYAN WARD, ET ALS.

Appearances:

Wm. N. Bonner, Esq., Houston, Texas; W. D. Gordon, Esq., Beaumont, Texas, and Messrs. Terriberry, Young, Rault & Carroll, New Orleans, La., Solicitors for Mrs. Itasca Kinney Wards, as Executrix of the Estate of Bryan Ward, Deceased, et als., Appellants.

1 Messrs. Cobb & Saunders, Solicitors for William Helis, Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the 29th day of November, 1937, at the City of New Orleans, Louisiana.

Extensions of time granted by the Honorable Circuit Court of Appeals for the Fifth Circuit, bringing the return day up to and including the 27th day of February, A. D. 1938.

TRANSCRIPT OF THE RECORD.

(TRANSCRIPT OF REMOVAL FROM CIVIL DISTRICT
COURT FOR THE PARISH OF ORLEANS.)

(Filed in U. S. Dist. Court, E. Dist. of La., May 27, 1935,
No. 292 Eq.)

State of Louisiana,
Parish of Orleans,
City of New Orleans.

Civil District Court for the Parish of Orleans.

No. 212-370.

Division "E".

Docket #4.

William Helis,

vs.

Bryan Ward, et als.

Filed May 14th, 1935.

(Signed) R. T. Kelly, Deputy Clerk.

To the Honorable the Judges of the Civil District Court
for the Parish of Orleans, State of Louisiana:

The petition of William Helis who resides in the City
of New Orleans, respectfully shows, that:

I.

Prior to February 6th, 1935, Iberia Oil Corporation, a Louisiana corporation, and Y. D. Spell, a defendant herein, in the proportion of two-thirds ($\frac{2}{3}$ rd) and one-third ($\frac{1}{3}$ rd) to each, respectively, owned the entire seven-eighths working interest in and to that certain oil, gas and mineral lease dated September 28, 1931, by Willie J. Bernard in favor of E. V. Richard, duly registered in the Conveyance Office for the Parish of Iberia, Louisiana, in Book 117 at Folio 562, and acquired by said Iberia Oil

Corporation and Y. D. Spell by mesne conveyance, and covering the property more particularly described as follows, to-wit:

"A certain tract of woodland situated in the Third Ward, of the Parish of Iberia, measuring and containing Sixty seven and eighty hundredths (67.80) arpents and presently bounded on the North by property of H. S. Sealy, et al., on the South by Road; on the East by property of H. F. Reynaud, et al., or assigns, and on the west by property of Dr. George J. Sabatier, et al., lying in and forming part of Section 54, Township 12 South, Range 7 East, Southwestern Land District of Louisiana, as shown on page 2 hereof."

II.

As of said sixth day of February, 1935, said Iberia Oil Corporation and Y. D. Spell had a producing oil well on said property known as the "Bernard No. 1" and were in process of drilling another well known as the "Bernard No. 2," which at that time had been drilled to a depth of approximately 1765 feet.

III.

On said sixth day of February, 1935, said Iberia Oil Corporation and Y. D. Spell entered into a contract with petitioner, the original whereof is hereunto annexed and made part hereof as fully as if set out in extenso, being marked "P-1" for identification herewith, whereunder petitioner agreed to drill a third well at his own expense, to be known as the Bernard No. 3 well, and in the event either the Bernard No. 2 well or the Bernard No. 3 should be brought in as a producer, petitioner was given the right under said contract to purchase the said leasehold estate on the terms and provisions set forth in Paragraphs 3 and 4 of said agreement, which are as follows:

3. At any time prior to the expiration of the options herein granted, Second Party shall have the right to purchase the aforescribed mineral lease and all rights thereunder, including all oil produced from the Bernard #1 well from the date of completion of the Bernard #2 well, as follows:

(a) In the event the Bernard #2 well or the Bernard #3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8 inch choke according to the methods usually employed in gauging the capacity of oil wells.

(b) In the event either the Bernard #2 or the Bernard #3 well should be brought in capable of producing more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

4 The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of 1/4th of 7/8ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property.

First Parties agree that any existing oil payments shall be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by Second Party; it being the intention of the parties that Second Party shall acquire the full 7/8ths working interest of First Parties free and clear of any and all liens and encumbrances whatsoever.

4. In addition to the applicable purchase price to be paid by Second Party, as above set forth, Second Party shall also pay to First Parties, in the event any option

granted herein is exercised, the actual cost incurred by First Parties in the drilling of the Bernard #2 well, whether the said well is a producer or not, and Second Party shall pay, whether the aforesaid option to purchase be exercised or not, the entire cost of drilling and completing the Bernard #3 well, which shall be solely for account of Second Party and free of any obligation whatever to First Parties. In drilling said well #3 as above provided, Second Party will pay all bills as they accrue and protect First Parties and the leasehold estate against the filing of any liens.

IV.

Acting under said contract petitioner duly moved his equipment onto the said premises and drilled the said "Bernard No. 3" well to a depth of approximately 4,092 feet, but it was not a producer, the said Iberia Oil Corporation and Y. D. Spell in the meantime having continued drilling their Bernard No. 2 well, as the contract required them so to do, and on or before the first day of April, 1935, finally abandoned said "Bernard #2" well as a dry hole, having drilled it into a salt formation.

V.

On said first day of April, 1935, said Iberia Oil Corporation and Y. D. Spell in order to persuade petitioner to continue drilling to at least 4,800 feet, entered into a supplemental agreement with him, a duplicate original whereof is hereto annexed and made part hereof as fully as if set out in extenso and marked "P-2" for identification herewith.

VI.

Pursuant to said supplemental agreement of April 1st, 1935, petitioner continued drilling and on April 21st,

1935, petitioner struck oil, his aforesaid Bernard No. 3 well being brought in as a producer at about 4,750 feet.

VII.

At the time the said well came in and at all times since it has actually produced not in excess of 3000 barrels per day calculated on a 3/8 inch choke according to the methods usually employed in gauging the capacity of oil wells.

VIII.

Paragraph 3 of the aforesaid contract, set out in extenso hereinbefore, provided for a test period of 15 days to determine the average daily production calculated on a 3/8 inch choke according to the usual methods employed in gauging the capacity of oil wells and said Iberia Oil Corporation and Y. D. Spell had their representative, E. O. Buck, on or about April 29th, 1935, make a test of said well and the result of said test showed that its production was less than 3000 barrels per day on a 3/8th inch choke calculated according to the usual methods employed in gauging the capacity of oil wells.

IX.

Under the terms of the said contract the purchase price of the aforesaid leasehold estate was to be \$300,000.00 in the event the average daily production of said Bernard No. 3 well should be less than 3000 barrels per day during the said test period of fifteen days, 50% of said amount being payable in cash on delivery of a proper deed and the other 50% out of proceeds from production.

X.

By supplemental agreement annexed to the original contract it was agreed between the parties as follows:

"It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them

of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden, of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire."

XI.

Notwithstanding it was conceded by all interested parties that the average daily production of the well was not in excess of 3000 barrels per day on a 3/8 inch choke, and said fact is beyond dispute, said Iberia Oil Corporation and Y. D. Spell insisted that under the supplemental agreement above set forth C. E. Hardin should name an engineer to act as umpire, which petitioner insisted at all times was not necessary.

XII.

Prior to the appointment of the said umpire by said C. E. Hardin, attorney, the latter, though he was acting in a capacity purely judicial in character, consulted in a professional capacity with the attorney for Iberia Oil Corporation and Y. D. Spell in matters pertaining to the controversy and either actually accepted employment to represent Iberia Oil Corporation and Y. D. Spell, prior to his designation of an umpire, or entertained the hope of acting as counsel for said Iberia Oil Corporation and Y. D. Spell, and at all times prior to said appointment had reason to believe from his contacts with said attorney for Iberia Oil Corporation and Y. D. Spell that he would act as their counsel should litigation develop.

XIII.

Notwithstanding said C. E. Hardin had for the reasons aforesaid disqualified himself from acting in said capac-

ity purely judicial in character, to-wit, the appointment of an engineer to act as umpire, he, nevertheless, over the protests of petitioner, appointed C. E. Massey to act as said umpire, the said C. E. Massey having been suggested to him by the attorney for said Iberia Oil Corporation and Y. D. Spell.

XIV.

Petitioner alleges that the language of the contract is so plain and unambiguous as to have precluded the necessity for the appointment of said engineer as umpire but in the event and only in such event that the Court should hold the language of the contract ambiguous then the claims of defendants herein to the maximum purchase price are predicated on a highly theoretical; conjectural, speculative and controversial issue which the said C. E. Hardin at all times prior to his appointment of said C. H. Massey well knew and the testimony of any engineer designated by said C. E. Hardin necessarily might be important so that the interests of all contracting parties required that any engineer to be named by said C. E. Hardin be absolutely independent.

XV.

Over the protests of petitioner, said C. E. Massey made a test of the said well on or about the 5th day of May, 1935, and said test showed that the well was incapable of producing as much as 3000 barrels per day on a 3/8 inch choke although it was his opinion that it could produce more than 3000 barrels per day on a choke larger than a 5/8 inch choke, a copy of his report being annexed hereto and made part hereof as fully as if set out in extenso.

XVI.

Notwithstanding the report of said C. E. Massey was favorable to the position of petitioner as to the actual production of the well on a 3/8 inch choke, your peti-

tioner avers that said C. E. Massey was without right or power to act in the capacity of umpire by virtue of the fact that said C. E. Hardin had disqualified himself from making such an appointment and that the opinion of the said C. E. Massey as to the possible production of the well on a choke larger than a 3/8 inch choke is beyond the intendment of the contract and any and all matters and things done by said C. E. Massey are, therefore, null and void.

XVII.

Under the contract petitioner was required to give notice to Iberia Oil Corporation and Y. D. Spell of his election to exercise his option to purchase the said leasehold estate for the applicable purchase price and did so on May 7th, 1935, by registered mail duly sent to said Iberia Oil Corporation at 1706 Sterling Building, Houston, Texas, and Y. D. Spell at 2215 Blanchette Street, Beaumont, Texas, as the contract required, and in the following form, to-wit:

"Iberia Oil Corporation,
1706 Sterling Building,
Houston, Texas.

Mr. Y. D. Spell,
2215 Blanchette Street,
Beaumont, Texas.

8 Dear Sirs:

In accordance with the contract between us dated February 6th, 1935, as supplemented by our agreement dated April 1st, 1935, you are notified that I hereby unconditionally exercise the option granted in Paragraph #3 of said contract dated February 6th, 1935, to purchase, for the applicable purchase price as fixed and determined by said contract, and otherwise on the terms and conditions therein stated, your entire seven-eighths

(7/8ths) working interest in and to that certain oil, gas and mineral lease dated September 28th, 1931, by Willy J. Bernard, et al., in favor of E. V. Richard, duly registered in the Conveyance Office for the Parish of Iberia, Louisiana, in Book 117 at folio 562 and acquired by you by mesne conveyance, including all oil produced from all wells from the date of completion of your Bernard No. 2 well, and also all physical equipment used and useful in connection with the operation of the said lease, except that expressly excluded by the contract. Under said contract you are required to transfer to me a full seven-eighths (7/8ths) working interest free and clear of any and all liens and encumbrances whatsoever. Any existing oil payments are to be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by me, and you are also required under Paragraph #7 of said agreement to produce prior to or at the time of payment of the cash portion of the purchase price, "satisfactory evidence showing the payment, as of the date of the transfer of the leasehold estate to me, of all severance and production taxes due on oil theretofore produced and also the payment of all royalties due on oil theretofore produced." We interpret this latter provision of the contract to embrace only oil produced and sold by you prior to the date of completion of your Bernard No. 2 well because oil produced thereafter belongs to me under the agreement and I shall make payment of all severance, taxes and royalties due thereon.

In addition to the applicable purchase price as fixed and determined by the contract, I shall also pay you the actual cost incurred by you in the drilling of your Bernard No. 2 well which was not a producer, having been drilled into the salt. Your attorney, Judge Wm. Bonner, has heretofore been requested to furnish us your statement of such cost but has not done so.

It is our insistence that the purchase price under the contract is \$300,000.00 for the reason the actual average daily production of my Bernard No. 3 well is and has

been less than 3000 barrels on a 3/8 inch choke, calculated according to the methods usually employed in gauging the capacity of oil wells and as fixed by the contract. It is conceded by E. O. Buck, the engineer appointed by you to make the test of the capacity of the well, that it is unable to produce as much as 3000 barrels per day on a 3/8 inch choke, but nevertheless you have heretofore advised me that you are claiming the applicable purchase price under the contract is \$400,000.00. I deny your right so to claim.

It would be a burdensome hardship for me to pay you at the time stated in the contract \$200,000.00 representing the cash payment of 50% of the maximum price you are demanding rather than \$150,000.00 which is the true and correct amount due as fixed and determined by the agreement. However, under Paragraph #5 of the contract my failure to exercise the applicable option would cause me to lose all rights under the agreement, and the Bernard No. 3 well which you claim has a capacity of more than 3000 barrels per day would become
9 your sole property. Your contention is without merit or foundation but as you have indicated

a desire to litigate, and I am anxious to develop the property by drilling additional wells which would be impossible should you throw the matter into litigation thereby causing me untold monetary loss and expense, in order to protect my rights and minimize my damages you are advised that this exercise of the options granted by the contract of February 6th, 1935, is to be construed as applying to the proper applicable purchase price as therein determined whether it be \$300,000.00 or \$400,000.00, and at the time fixed by the agreement, I will pay you in cash 50% of said price of \$400,000.00 which you notified me you demand and will also pay and discharge at the same time any other obligations undertaken by me in said contract, all with full reservation, however, of any and all rights which I have or may have under and by virtue of said agreement. Under any and all circumstances, this exercise of the aforesaid applicable option

is absolute and unconditional with respect to the proper purchase price due thereunder.

Demand is hereby made upon you to deliver to me in accordance with the contract the duly executed deed attached to the contract of February 6th, 1935, and marked "Exhibit A" for identification therewith, and upon your failure or refusal so to do I will enforce strictly my rights under the agreement and hold you responsible for all loss or damage which I may sustain in the premises."

XVIII.

It was not until after the notices aforesaid were mailed that petitioner received from the attorney for said Iberia Oil Corporation and Y. D. Spell a copy of the report of said C. E. Massey.

XIX.

At the same time that petitioner received said report, to-wit, on May 7th, 1935, petitioner was informed by counsel for said Iberia Oil Corporation and Y. D. Spell that said Iberia Oil Corporation had been dissolved and that Bryan Ward, a defendant herein, was named Liquidator and the deed from him to Bryan Ward, A. L. Mitchell and L. B. Mhoon, also defendants herein, was duly recorded in Book #124, Folio #571 of the Conveyance Records of the Parish of Iberia, said deed having been filed for record on May 4th, 1935.

XX.

On information and belief petitioner alleges that the aforesaid leasehold interest of Iberia Oil Corporation was its sole and only asset and that said corporation was dissolved and said property transferred to defendants, Bryant Ward, A. L. Mitchell and L. B. Mhoon,

10 all residents of Texas, for the sole and only purpose of defeating the Courts of Louisiana of jurisdiction herein and requiring petitioner to litigate with said defendants in Texas under strange laws.

XXI.

On May 13th, 1935, petitioner was notified orally by National Bank of Commerce in New Orleans that a draft had been drawn upon it by The Union National Bank, Houston, Texas, for \$215,530.34 which represents the maximum cash portion of the purchase price (\$200,000.00) claimed by the sellers and \$15,530.34 covering the alleged cost of drilling the Bernard No. 2 well, petitioner under the contract of February 6th, 1935 (paragraph #4) having agreed to pay the actual costs incurred by Iberia Oil Corporation and Y. D. Spell in the drilling thereof.

XXII.

On May 13th, 1935, your petitioner's attorneys received from counsel for the defendants herein (except The Union National Bank, Houston, Texas) a telegram which excluding matters unimportant herein reads as follows:

"Full rights both parties reserved without specifying continuously."

XXIII.

On May 14th, 1935, petitioner, in order to protect his rights under the said contract, paid to National Bank of Commerce in New Orleans as the agent of defendants herein, the said sum of \$215,530.34 plus the additional sum of \$1,918.90 covered by a separate draft and allegedly covering the cost of fuel oil.

XXIV.

Under Paragraph #3 of the said contract of February 6th, 1935, the parties agreed that any existing oil payments would be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by petitioner but notwithstanding said provision defendants failed to attach to the aforesaid draft for \$215,530.34 a release from an oil payment due Warich Oil Corporation in the sum of \$15,-

11 593.52, which is in the nature of a lien upon the oil produced from the aforesaid property and for which petitioner would be responsible if not paid.

XXV.

Petitioner now alleges that the true and correct cash portion of the purchase price was \$150,000.00 and not \$200,000.00 and that defendants herein wrongfully demanded \$50,000.00 more than was due and which said sum plaintiff, to protect his interest, paid involuntarily and with full reservation of his rights as aforesaid and is entitled to recover said sum and the additional sum of \$15,593.52 to protect petitioner from loss against the oil payment above described, plaintiff reserving all of his rights to contest by appropriate proceedings the correctness of the costs allegedly incurred by defendants in the drilling of said Bernard No. 2 well which, as stated hereinbefore, amounted to \$15,530.34.

XXVI.

The Union National Bank, Houston, Texas, is a foreign corporation and neither qualified nor doing business in the State of Louisiana and is a non-resident of the State of Louisiana.

XXVII.

The said Union National Bank, Houston, Texas, in sending the aforesaid drafts to National Bank of Commerce in New Orleans, drawn on petitioner, as aforesaid, was acting as agent for Bryan Ward, Y. D. Spell, A. L. Mitchell and L. B. Mhoon, and said Union National Bank, Houston, Texas, has within the jurisdiction of this Court property of the aforesaid defendants.

XXVIII.

As hereinbefore set forth said Iberia Oil Corporation was dissolved for the purpose of defeating the Louisiana Courts of jurisdiction and all the defendants herein are non-residents of the State of Louisiana and if the said Bernard No. 3 well should cease producing, as wells in the Gulf Coastal region frequently do, plaintiff herein will suffer an immediate monetary loss of said sum of \$50,000.00 unless he should be able to recover the said amount in Texas if the defendants herein remain solvent.

12

XXIX.

That a writ of attachment is necessary to protect petitioner in the premises.

XXX.

Petitioner believes that National Bank of Commerce in New Orleans and/or Federal Reserve Bank of Atlanta (New Orleans Branch), both of whom are located in this City, are indebted to Bryan Ward, A. L. Mitchell, L. B. Mhoon and Y. D. Spell and/or The Union National Bank, Houston, Texas, as agents for said parties, or has property in their possession or under their control belonging to said defendants and petitioner desires that the said National Bank of Commerce in New Orleans and Federal

Reserve Bank of Atlanta (New Orleans Branch) be made garnishee herein and be required to answer under oath and in writing the interrogatories annexed to this petition.

Wherefore, the premises and the annexed affidavit considered, petitioner prays that a writ of attachment issue herein upon plaintiff furnishing bond, with good and solvent surety, in the amount fixed by law and conditioned as the law requires, commanding the Civil Sheriff for the Parish of Orleans to seize and attach, according to law, property of said Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, within the jurisdiction of this Court, sufficient to discharge and satisfy petitioner's said claim and to hold the same subject to further order of this Court and to the judgment to be hereafter rendered herein.

That said National Bank of Commerce and Federal Reserve Bank of Atlanta (New Orleans Branch) be made garnishees herein and ordered to answer the annexed interrogatories according to law.

That said Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, defendants herein, be duly cited to appear and answer this petition and that they and each of them be served with a copy of the same and that after due proceedings had there be judgment in favor of petitioner and against said Bryan Ward, A. L. Mitchell, L. B. Mhoon and Y. D. Spell for the full sum of \$65,593.52 with legal interest thereon from May 13th, 1935, until paid and all costs of suit and that any monies in the name of The Union National Bank, Houston, Texas, within the jurisdiction of this Court belonging to the said defendants be subjected to the lien of the seizure herein, and that all petitioner's rights with respect to the correctness of the defendants' statement for the cost of drilling the Bernard No. 2 well be specifically reserved.

That the writ of attachment herein be maintained and that petitioner's lien and privilege resulting from the attachment and garnishment herein on all the property or debts herein attached or garnisheed be recognized and enforced; that said property or debts be sold and that petitioner's claim, interest and costs, be paid by preference and priority over all other creditors of said Bryan Ward, A. L. Mitchell, L. B. Mhoon and Y. D. Spell out of the proceeds of said sale.

Petitioner further prays for all full, general and equitable relief as the nature of the case may require and law and equity may permit.

(Sgd.)

COBB & JONES,

Attorneys for Petitioner.

(Signed) LLOYD S. COBB,
Trial Attorney.

14 State of Louisiana,
Parish of Orleans.

Before me, the undersigned authority a Notary Public duly commissioned and qualified in and for the Parish and State aforesaid, personally came and appeared William Helis, who being by me first duly sworn, did depose and say:

That he is the plaintiff in the above and foregoing petition; that he has read the same and that all of the defendants therein named reside permanently outside the State of Louisiana and that all the facts and allegations therein contained are true and correct and that a writ of attachment herein is necessary to preserve petitioner's rights in the premises.

(Signed)

WILLIAM HELIS.

Sworn to and subscribed before me this 14th day of May, 1935.

(Signed)

LLOYD S. COBB,

(Seal)

Notary Public.

15

ORDER.

Let a writ of attachment issue herein as prayed for, upon plaintiff giving bond with good and solvent surety and conditioned as the law directs.

Let National Bank of Commerce in New Orleans and Federal Reserve Bank of Atlanta (New Orleans Branch) be made and duly cited as garnishees herein to answer the accompanying interrogatories, under oath, categorically and in writing, within ten days from service thereof, and as the law directs.

(Signed) WM. H. BYRNES, JR., Judge.

New Orleans, Louisiana, May 14th, 1935.

16

**INTERROGATORIES PROPOUNDED TO
NATIONAL BANK OF COMMERCE IN
NEW ORLEANS TO BE ANSWERED BY
IT, UNDER OATH, CATEGORICALLY
AND IN WRITING, WITHIN TEN DAYS
FROM SERVICE THEREOF ON IT.**

Civil District Court for the Parish of Orleans,
State of Louisiana.

No..... Division "...." Docket #.....

William Helis

vs.

Bryan Ward, et als.

1st Interrogatory: Had you in your hands or under your control, directly or indirectly, at the time of service of these interrogatories, or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to the said defendants, in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union Na-

tional Bank, Houston, Texas, or in which they or any of them have or had any interest for the whole or for a part; and if yes, what is the nature, description and amount thereof; and is the same sufficient to pay or to satisfy the full amount of said writ, or if less, to what amount?—you being asked and required to make a full disclosure in relation to the same.

2nd Interrogatory: Were you not, at the time of service upon you of these interrogatories, or since, directly or indirectly indebted or obligated unto the said defendants, in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interests of said defendants in writ be direct or indirect, or be for the whole or a part only, or
 17 whether it be by bill, note or otherwise; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said writ and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3rd Interrogatory: Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendants in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, any payment or novation or compromise, or arrangement or given them or any of them any note or written obligation, or received from them directly or indirectly, any receipt or acquittance? and if yes, state the nature, description and amount thereof, and the time, place and circumstances of the same.

4th Interrogatory: Are the defendants in the suit, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, employed by you, and if so, what are their rate of compensation, in what manner is it paid, and whether or not other judgments on garnishment affect such wage, salary or compensation? You being asked and required to make a full disclosure in relation to the same.

18 **INTERROGATORIES PROPOUNDED TO FEDERAL RESERVE BANK OF ATLANTA (NEW ORLEANS BRANCH) TO BE ANSWERED BY IT UNDER OATH, CATEGORICALLY AND IN WRITING, WITHIN TEN DAYS FROM SERVICE THEREOF ON IT.**

Civil District Court for the Parish of Orleans,
State of Louisiana.

No.....

Div. "...."

Doc. #....

William Helis

vs.

Bryan Ward, et als.

1st Interrogatory: Had you in your hands or under your control, directly or indirectly, at the time of service of these interrogatories, or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to the said defendants, in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, or in which they or any of them have or had any interest for the whole or for a part; and if yes, what is the nature, description and amount thereof; and is the same sufficient to pay or to satisfy the full amount of said writ, or if less, to what amount?—

you being asked and required to make a full disclosure in relation to the same.

2nd Interrogatory: Were you not, at the time of service upon you of these interrogatories, or since, directly or indirectly indebted or obligated unto the said defendants, in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interests of said defendants in writ be direct or indirect, or be for the whole or a part only, or whether it be by bill, note or otherwise; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said writ and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3rd Interrogatory: Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendants in writ, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, any payment or novation or compromise, or arrangement or given them or any of them any note or written obligation, or received from them directly or indirectly, any receipt or acquittance? and if yes, state the nature, description and amount thereof, and the time, place and circumstances of the same.

4th Interrogatory: Are the defendants in the suit, Bryan Ward, A. L. Mitchell, L. B. Mhoon, Y. D. Spell and The Union National Bank, Houston, Texas, employed by you, and if so, what are their rate of compensation, in what manner is it paid, and whether or not other

judgments on garnishment affect such wage, salary or compensation? You being asked and required to make a full disclosure in relation to the same.

20 **WRIT OF ATTACHMENT AND SHERIFF'S
RETURN THEREON.**

Issued May 14th, 1935.

State of Louisiana,
Civil District Court of the Parish of Orleans.

No. 212,370.

Division "E".

Docket 4.

The State of Louisiana,

To the Sheriff of the Parish of Orleans—Greeting:

Whereas, due proof has been made before the Civil District Court for the Orleans, by William Helis, Plaintiff, that Bryan Ward, et als., Defendants, are justly indebted to William Helis, Plaintiff, in the sum of (\$65,593.52) Sixty-Five Thousand, Five Hundred Ninety-Three Dollars and Fifty-Two Cents Dollars; with legal interest from May 13th, 1935, until paid and all costs of suit and that the said Bryan Ward, et als., Defendants Y. D. Spell, A. L. Mitchell, L. B. Mhoon and the Union National Bank, Houston, Texas, reside permanently out of the State of Louisiana.

Now, Therefore, You Are Commanded, in the name of the State of Louisiana, and of the Civil District Court for the Parish of Orleans, to seize and attach according to law, and to take into your possession the goods and chattels, lands and tenements, rights and moneys, effects

and credits of the said Bryan Ward, et als., Defendants, Y. D. Spell, A. L. Mitchell, L. B. Mhoon and the Union National Bank, Houston, Texas, if any you find in said Parish, to the amount of what will suffice to discharge said debt and costs of suit, and that you give notice of this proceeding by leaving a copy thereof at the last place of abode of the said defendant if in said parish and causing a copy thereof to be affixed on the door of the room where the Court in said suit is pending is held; or on a bulletin board located near the entrance of said Court Room, and make return of this writ and indorse thereon the manner in which you have executed it, before our Court according to law.

Clerk's office, 14th day of May, 1935.

(Signed) E. S. DUNN,
Deputy Clerk.

21

Sheriff's Return.

Received Tuesday May 14th, 1935, and on the 15 day of May, 1935, Posted a copy of the within Writ of Attachment to the door of the Room of Division "E" where this Honorable Court holds its sittings.

Returned same day.

Sheriff's fee \$1.

(Signed) K. H. ENGEL,
Deputy Sheriff.

22 **BOND FOR WRIT OF ATTACHMENT AND
SEQUESTRATION.**

Filed March 14, 1935.

State of Louisiana,
Civil District Court for the Parish of Orleans.

No. 212-370.

Division

Docket 4.

William Helis
versus
Bryan Ward, et als.

Know All Men By These Presents, That we William Helis as principal and Columbia Casualty Company as surety of the City of New Orleans and State of Louisiana, are held and firmly bound unto John J. O'Neill, Clerk of the Civil District Court for the Parish of Orleans, and his successors in said office, in the sum of Twelve Hundred & Fifty (\$1,250.00) Dollars lawful money of the United States of America, for which payment, well and truly to be made to the said Clerk or his successors, we bind ourselves, in solido, and each of our executors, administrators, heirs and assigns, firmly by these presents.

Signed and dated the 14th day of May, 1935.

Whereas, the said William Helis has this day obtained an order from the Civil District Court for the Parish of Orleans, ordering a writ of attachment to issue in the suit entitled William Helis vs. Bryan Ward, et als., No. 212370.

Now, the condition of the above obligation, is that we, the above bound principal and surety will well and truly pay to said Clerk, or his successors in office, for the bene-

fit of any and all persons interested in said suit, all such damages as may be recovered against us, in case it should be decided that the said writ was wrongfully obtained.

(Signed) WILLIAM HELIS,

COLUMBIA CASUALTY COMPANY,

By A. DENTIN, JR.,

Attorney in Fact.

Countersigned:

(Sgd.) E. N. COBB.

23

Affidavit of Surety.

..... being duly sworn, says that.....
is worth over and above all..... Debts and obligations
..... Dollars in assets that can be subjected to
levy under execution, and that resides in
the Parish of Orleans.

Sworn to and subscribed before me this..... day of
....., 193..... A. D.

Affidavit of Principal.

William Helis being duly sworn, says that he is informed and believes that Columbia Casualty Company the surety on this bond, is worth over and above its debts and obligations in assets that can be subjected to levy under execution, the amount for which it has bound itself in this bond.

(Sgd.) WILLIAM HELIS.

Sworn to and subscribed before me this 14th day of May, 1935 A. D.

(Signed) LLOYD J. COBB,
Not. Pub.

Filed 193.....

Deputy Clerk.

(On Reverse.)

No. 212-370, Civil District Court for the Parish of Orleans. W. J. Helis vs. B. Ward, et al. Bond for Writ of Attachment and Sequestration. Filed March 14th, 1935.
(Signed) E. S. DUNN, Deputy Clerk.

24

AGREEMENT.

Filed May 15, 1935.

This agreement, made and entered on this 6th day of February, 1935, by and between Iberia Oil Corporation, a Louisiana Corporation, herein represented by A. L. Mitchell, President, acting under and by virtue of a resolution of the Board of Directors, this day adopted, a certified copy whereof is hereunto annexed and made part hereof, and Y. D. Spell, of Beaumont, Texas, both hereinafter called First Parties, and William Helis, of New Orleans, Louisiana, hereinafter called Second Party,

Witnesseth:

Whereas, First Parties are the owners of the full 7/8ths working interest in and to that certain oil, gas and mineral lease dated September 28, 1931, by Willy J. Bernard, et al., in favor of E. V. Richard, duly registered in the Conveyance Office, Parish of New Iberia, Louisiana, in Book 117, at folio 562, and acquired by First Parties herein by mesne Conveyance, and

Whereas, First Parties have heretofore drilled a producing oil well on the property covered by said lease, described as follows (said well being known as the "Bernard No. 1"):

A certain tract of land, containing sixty (60) acres, more or less, in superficial area, situated in the Little

Bayou Oil Field, in the Parish of Iberia, State of Louisiana, which tract of land is bounded in front or on the South by a road or by land of C. O. Noble et al., or assigns, in the rear or on the North by property of Harvest S. Sealy et al. or assigns (formerly property of John E. Schwing), on the East by property of H. F. Reynard or assigns and on the West by property of Dr. George J. Sabatier or assigns, and

Whereas, First Parties have agreed to assign said mineral lease and all rights thereunder to Second Party on the terms and conditions hereinafter set forth:

Now, therefore, it is mutually agreed as follows:

1. First Parties agree, at their own expense, to drill to completion to a depth of 4000 feet unless oil, gas, salt dome formation, or cavity should be encountered at a lesser depth to make further drilling impractical, that certain oil well located on said tract and now in process of drilling, and known as the "Bernard No. 2," and which as of the date hereof has been drilled to a depth of approximately 1765 feet.

2. Second Party agrees to commence actual drilling operations on a third well shall be known as "Bernard No. 3," the same to be located on the aforescribed property, and agrees to drill the said well to completion or abandonment as described above with reference to the Bernard No. 2 Well now being drilled, such drilling operations to be commenced within fifteen days from the date hereof.

3. At any time prior to the expiration of the options herein granted, Second Party shall have the right to purchase the afore-described mineral lease and all rights thereunder, including all oil produced from the Bernard

No. 1 well from the date of completion of the Bernard No. 2 well, as follows:

(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells.

(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of 1/4th of 7/8ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property.

First Parties agree that any existing oil payments shall be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by Second Party; it being the intention of the parties that Second Party shall acquire the full 7/8ths working interest of First Parties free and clear of any and all liens and encumbrances whatsoever.

4. In addition to the applicable purchase price to be paid by Second Party, as above set forth, Second Party shall also pay to First Party, in the event any option granted herein is exercised, the actual cost incurred by First Parties in the drilling of the Bernard No. 2 well, whether the said well is a producer or not, and Second Party shall pay, whether the aforesaid option to purchase be exercised or not, the entire cost of drilling and complet-

ing the Bernard No. 3 well, which shall be solely for account of Second Party and free of any obligation whatever to First Parties. In drilling said well No. 3 as above provided, Second Party will pay all bills as they accrue and protect First Parties and the leasehold estate against the filing of any liens.

5. Within two days after the expiration of the test period of fifteen days following the completion of the Bernard No. 3 well drilled by Second Party, said Second Party shall elect to accept or reject the applicable option to purchase herein granted, and such acceptance or rejection shall be by registered mail addressed to Iberia Oil Corporation, Inc., at 1706 Sterling Building, Houston, Texas, and Y. D. Spell, 2215 Blanchette Street, at Beaumont, Texas. Failure of Second Party to give the required notice shall be deemed to be a rejection of the options granted, and Second Party shall have no further rights hereunder, and said Bernard No. 3 well shall become the sole property, of First Parties.

6. Within ten days after the exercise of the option to purchase the aforesaid mineral lease and rights thereunder, First Parties agree to execute a valid assignment to William Helis, on the form attached hereto and marked "Exhibit A" by the parties for identification with this contract, of the said oil, gas and mineral lease dated September 28, 1931, and transfer to him all rights thereunder, including oil produced from all wells

27 from the day of completion of the Bernard No. 2 well, and also all physical equipment used and useful in connection with the operation of the said lease, which equipment is owned by Iberia Oil Corporation, Inc., but excluding property or equipment owned by A. L. Mitchell and/or Y. D. Spell, A. B. Mhoon and Bryan Ward, individually. Said assignment shall be delivered to National Bank of Commerce in New Orleans, New Orleans, Louisiana, for attention of William Helis, and said Second Party shall accept the same and pay the proper cash portion of the purchase price within three

days after Second Party shall have been notified in writing of the delivery of said assignment to the said bank. The aforesaid assignment shall contain a reservation in favor of First Parties, as their interest may appear, of an oil payment in the amount of fifty per cent of the applicable purchase price as herein determined to be out of the proceeds of 1/4th of 7/8ths of the production from all wells drilled and hereafter drilled on said property, and shall also contain a full warranty of title to the Mineral lease and the fee estate.

7. First Parties further agree to produce, prior to or at the time of payment of the cash portion of the purchase price, satisfactory evidence showing the payment, as of the date of the transfer of said lease to Second Party, of all severance and production taxes due on oil theretofore produced, and also the payment of all royalties due on oil theretofore produced.

8. In the event Second Party duly accepts either one of the options to purchase granted by this instrument and First Parties fail or refuse to deliver the said assignment, as provided, Second Party shall have the right to deposit in National Bank of Commerce in New Orleans, to the joint credit of First Parties, the applicable cash portion of the purchase price and this instrument thereafter shall stand in lieu of the aforesaid assignment and Second Party shall thereafter own and hold possession of the leasehold estate in the same manner as if the said assignment had been executed.

Executed in triplicate originals at Houston, Texas, the day and date first above written.

(Signed) Y. D. SPELL,

28

IBERIA OIL CORPORATION,

By A. L. MITCHELL, President.

(Signed) WILLIAM H. IS.

Witnesses:

(Signed) WM. SMITH,

(Signed) A. B. MHOON.

The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the county and State aforesaid, personally came and appeared A. L. Mitvhell, a person well known to me, Notary, and known to me to be the person who executed the above and foregoing instrument and acknowledged that he executed the same for and on behalf of Iberia Oil Corporation, as President thereof, by authority of its Board of Directors and for the uses and purposes therein stated.

(Signed) A. L. MITCHELL.

Given under my hand and seal at Houston, in Harris County, Texas, this 6th day of February, 1935.

(Signed) AILEEN A. MERGON, ?
Notary Public, Harris
County, Texas.

The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the county and State aforesaid, personally came and appeared Y. D. Spell, a person well known to me, Notary, and known to me to be the person who executed the above and foregoing instrument, and acknowledged that he executed the same as his own free act and deed and for the uses and purposes therein stated.

(Signed) Y. D. SPELL.

Given under my hand and seal of office at Houston, in Harris County, Texas, this 6th day of February, 1935.

(Signed) AILEEN A. MERGON, ?
Notary Public, Harris
County, Texas.

29 Special Meeting of the Board of Directors of Iberia Oil Corporation, held at the office of the Corporation, at 1706 Sterling Building, Houston, Texas, at 11:00 A. M., February 6, 1935.

A special meeting of the Board of Directors of Iberia Oil Corporation, Inc., was duly called by the President.

Present: A. L. Mitchell, Bryan Ward, A. B. Mhoon, being all the directors of the Corporation.

Mr. Mitchell acted as President and Mr. Mhoon recorded the minutes of the meeting as Secretary.

The President stated that the matter of entering into a contract with William Helis, of New Orleans, Louisiana, covering the drilling of oil wells on the company's property at New Iberia, Louisiana, and the granting to Mr. Helis of an option to purchase the mineral lease owned by the company, was open for discussion.

Upon motion of Bryan Ward, seconded, the following resolution was unanimously adopted:

Resolved, that this Corporation enter into a contract with William Helis, of New Orleans, Louisiana, on the terms and conditions set forth in the attached agreement dated this day, a copy whereof is hereunto annexed and made part hereof, and

Be it Further Resolved, that the President, A. L. Mitchell be and is hereby authorized, empowered and instructed to sign the original of said contract for and on behalf of this Corporation, and to do all other acts and things necessary and incidental to carry out the purposes

of the said agreement; all of which are hereby ratified, adopted and confirmed as the corporate acts of this Corporation.

There being no further business to come before the meeting, on motion duly seconded, it was duly adjourned.

(Signed) A. L. MITCHELL,

(Signed) NYRAN WARD,

(Signed) A. B. MHOON.

30 Minutes of a Special Meeting of the Shareholders of Iberia Oil Corporation, held at the office of the Company at 1706 Sterling Building, Houston, Texas, at 11:30 A. M., Feb. 6, 1935.

The meeting was called to order by the President, who acted as Chairman, and A. B. Mhoon was duly elected Secretary.

The Secretary stated that according to the records of the Corporation all the outstanding stock of the Company was owned by the following persons in the proportions set opposite their respective names: A. L. Mitchell, Bryan Ward, A. B. Mhoon.

The Chairman stated that as he, Messrs. Ward and Mhoon, were the sole shareholders in the Corporation, it was in order for them to consider the matter of approving and ratifying the contract dated February 6, 1935, between the Corporation and William Helis, of New Orleans, Louisiana, relative to the company's oil properties at New Iberia, Louisiana.

Upon motion, duly made and seconded and unanimously carried, the following resolution was adopted:

Resolved, that the action of the Board of Directors in entering into a contract this day with Mr. William Helis

of New Orleans, Louisiana, a copy whereof is hereunto annexed and made part of these minutes, be and the same is hereby ratified, adopted and approved, as the corporate act of this corporation.

There being no further business to come before the meeting, on motion seconded, it was duly adjourned.

(Signed) A. L. MITCHELL,

(Signed) BRYAN WARD,

(Signed) A. B. MHOON.

31

Assignment.

This agreement, made and entered into this.....day of, 1935, by and between Iberia Oil Corporation, a Louisiana corporation, herein represented by A. L. Mitchell, President, acting under and by virtue of a resolution of the Board of Directors duly adopted on February 6, 1935, a certified copy whereof, is hereto annexed and made a part hereof, and Y. D. Spell, of Beaumont, Texas, hereinafter known as Assignors, and William Hwlis, of New Orleans, Louisiana, hereinafter known as Assignee Witnesseth:

For and in consideration of the sum of Ten Thousand Dollars cash in hand paid by the Assignee, and other valuable considerations, receipt whereof is hereby acknowledged, and full acquittance and discharge therefor granted, the Assignors do by these presents (subject to the reserved oil payment hereafter stated) grant, bargain, sell, convey, set over, transfer, deliver, and assign to said William Helis, with full warranty of title, that certain mineral lease dated September 28, 1931, by Willy J. Bernard et al, in favor of E. V. Richard, duly registered in the Conveyance Office for the Parish of New Iberia, Louisiana, in Book 117, at folio 562, and acquired by the assignors herein by mesne Conveyance covering the following described property, to-wit:

A certain tract of land, containing sixty (60) acres more or less in superficial area, situated in the Little Bayou

Oil Field, in the Parish of Iberia, State of Louisiana, which tract of land is bounded in front or on the South by a road or by land of C. O. Noble et al., or assigns, in the rear or on the North by property of Havert S. Sealy et al., or assigns (formerly property of John E. Schwing), on the East by property of H. F. Reynaud or assigns, and on the West by property of Dr. George J. Sabatier or assigns.

This transfer and assignment shall include all the right, title and interest of the assignor, Iberia Oil Corporation, in and to any property or equipment owned by it and located on the leased premises and used and useful in connection with the operation of said property, and shall also include all oil produced from all wells located on the leased premises from and after the date of the completion of the well known as "Bernard "2."

Assignors herein reserve an oil payment in the sum of \$....., or fifty per cent of the purchase price as determined under the provisions of that certain
32 agreement dated February 6, 1935, between the same parties hereto; and said oil payment shall be paid by the assignee, its transferees and assigns, to the assignors in the proportion of two-thirds to Iberia Oil Corporation and one-third to Y. D. Spell, out of one-fourth of the proceeds derived by assignee from the sale of the seven-eighths working interest in and to the oil produced from the leasehold estate.

Executed at Houston, Texas, in triplicate originals, as of the day and date first above written.

IBERIA OIL CORPORATION,

By
President.

Witnesses:

.....
.....

The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the State and County aforesaid, personally appeared A. L. Mitchell, a person well known to me, Notary, and known to me to be the person who executed the above and foregoing instrument and acknowledged that he executed the same for and on behalf of Iberia Oil Corporation, Inc., as President, by authority of its Board of Directors, and for the uses and purposes therein stated.

Given under my hand and seal of office, at Houston, in Harris County, Texas, this day of, 1935.

.....,
Notary Public, Harris County,
Texas.

(Signed) W. H.
(Signed) Y. D. S.
(Signed) A. L. M.

33 The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the State and County aforesaid, personally appeared Y. D. Spell, a person well known to me, Notary, and known to me to be the person who executed the above and foregoing instrument, and acknowledged that he executed the same as his own free act and deed and for the uses and purposes therein stated.

Given under my hand and seal of office, at Houston, in Harris County, Texas, this day of, 1935.

.....,
Notary Public, Harris County,
Texas.

(Signed) Y. D. S.
(Signed) W. H.
(Signed) A. L. M.

Houston, Texas, February 6, 1935.

It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden, of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire.

SIBERIA OIL CORPORATION,
By A. L. MITCHELL, President.
By Y. D. SPELL,
By WILLIAM HELIS..

34 CITATION TO GARNISHEE AND SHERIFF'S
RETURN THEREON.

Issued May 14, 1935.

State of Louisiana,
Civil District Court for the Parish of Orleans.

No. 212,370.

Division

Docket

William Helis
versus
Bryan Ward, et als.

To National Bank of Commerce, Thru Its Proper Officer,
New Orleans, La.—Garnishee:

You Are Hereby Cited, to declare on oath, what property belonging to the Defendant in this case you have in your possession, or in what sum you are indebted to said Defendant, and also, to answer in writing, under oath, the interrogatories annexed to the Original Petition

of which a copy accompanies this citation, and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the services hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness, the Honorable Wm. H. Byrnes, Jr., Judge of the said Court, 14th day of May, in the year of our Lord, 1935.

(Signed) E. S. DUNN, Deputy Clerk.

Sheriff's Return.

12.02 P. M.

Received Tuesday, May 14th, 1935, and on the 14 day of May, 1935, served a copy of the within Citation and accompanying Original petition interrogatories on National Bank of Commerce, Garnishee herein by leaving same at its office 200 Baronne St., in the hands of W. J. Mitchell, Vice-President, a person apparently over the age 18 years whose name and other facts connected with this service I learned by interrogating the said W. J. Mitchell, Vice-President the said President and others superior officers being absent from its office at time of said service.

Returned same day. Sheriff's Fees, \$2.

(Signed) GUSTAVE P. PAUPART,
Deputy Sheriff of Orleans
Parish.

**35 CITATION TO GARNISHEE AND SHERIFF'S
RETURN THEREON.**

Issued May 14, 1935.

**State of Louisiana,
Civil District Court for the Parish of Orleans.**

No. 212,370.

Division

Docket

**William Helis
versus
Bryan Ward, et als.**

**To Federal Reserve Bank of Atlanta (New Orleans
Branch) Thru Its Proper Officer, New Orleans, La.—
Garnishee:**

**You Are Hereby Cited, to declare on oath, what prop-
erty belonging to the Defendant in this case you have
in your possession, or what sum you are indebted to
said Defendant, and also, to answer in writing, under
oath, the interrogatories annexed to the Original Petition
of which a copy accompanies this citation, and deliver
your answer to the same, in the office of the Clerk of the
Civil District Court for the Parish of Orleans, within ten
days after the service hereof, otherwise judgment will
be entered against you for the amount claimed by the
plaintiff with interest and costs.**

**Witness, the Honorable Wm. H. Byrnes, Jr., Judge of
the said Court, 14th day of May, in the year of our Lord,
1935.**

(Signed) E. S. DUNN, Deputy Clerk.

Sheriff's Return.

12:05 P. M.

**Received Tuesday, May 14th, 1935, and on the 14 day
of May, 1935, served a copy of the within Citation and**

accompanying Original petition, Interrogatories on Federal Reserve Bank of Atlanta (New Orleans Branch), Garnishee herein, by personal service on M. Warker, its manager.

Returned same day. Sheriff's Fees, \$2.

(Signed) GUSTAVE P. PAUPART,
Deputy Sheriff of Orleans
Parish.

36. MOTION TO RELEASE GARNISHEE AND
ORDER.

Filed May 15th, 1935.

Civil District Court for the Parish of Orleans,
State of Louisiana.

No. 212,370.

Division "E".

Docket 4.

William Helis
versus
Bryan Ward, et als.

On motion of William Helis, plaintiff in the above numbered and entitled cause, through his attorney, Cobb & Jones, and on suggesting to the Court that under the writ of attachment and garnishments issued herein there has been seized by the Civil Sheriff for the Parish of Orleans in National Bank of Commerce in New Orleans \$217,449.24, representing the proceeds belong to the defendants of two drafts drawn by them in the amounts of \$215,530.34 and \$1,918.90, respectively, which said drafts were duly paid to said National Bank of Com-

merce in New Orleans and also other monies in said bank belonging to said defendants; and on further suggesting to the Court that plaintiff herein desires to release, without prejudice to any of his rights in the premises, all monies belonging to defendants herein or any of them in National Bank of Commerce in New Orleans except the sum of \$50,000.00, representing part of the proceeds of the aforesaid draft for \$212,530.34, said amount to be held by the Civil Sheriff for the Parish of Orleans and/or National Bank of Commerce in New Orleans, subject to the further orders of this Court:

It is Ordered that the Civil Sheriff for the Parish of Orleans and/or National Bank of Commerce in New Orleans be and they are hereby authorized to release from the attachment and garnishments issued herein all funds belonging to defendants in National Bank of Commerce in New Orleans except \$50,000.00, representing part of the proceeds of the aforesaid draft for \$215,530.34, said sum of \$50,000.00 to be held, as required by law, subject to the further orders of this Court, and

37 It is Further Ordered that the aforesaid release be and is hereby made without prejudice to any of plaintiff's rights in the premises.

Dated at New Orleans, Louisiana, this 15th day of May, 1935.

(Signed) WM. H. BYRNES, JR.,
Judge.

(Signed) COBB & JONES,
Attorneys for Mover.

Serve National Bank of Commerce in New Orleans.

38

MOTION OF WILLIAM HELIS AND SHERIFF'S RETURN THEREON.

Filed May 15th, 1935.

Civil District Court for the Parish of Orleans,
State of Louisiana.

No. 212,370.

Division "E".

Docket

William Helis
versus
Bryan Ward, et als.

On motion of William Helis, plaintiff in the above numbered and entitled cause, through his attorneys, Cobb & Jones, and on suggesting to the Court that under the writ of attachment and garnishments issued herein there has been seized by the Civil Sheriff for the Parish of Orleans in National Bank of Commerce in New Orleans \$217,449.24, representing the proceeds belong to the defendants of two drafts drawn by them in the amounts of \$215,530.34 and \$1,918.90, respectively, which said drafts were duly paid to said National Bank of Commerce in New Orleans and also other monies in said bank belonging to said defendants; and on further suggesting to the Court that plaintiff herein desires to release, without prejudice to any of his rights in the premises, all monies belonging to defendants herein or any of them in National Bank of Commerce in New Orleans except the sum of \$50,000.00, representing part of the proceeds of the aforesaid draft for \$215,530.34, said amount to be held by the Civil Sheriff for the Parish of Orleans and/or National Bank of Commerce in New Orleans, subject to the further orders of this Court:

It is Ordered that the Civil Sheriff for the Parish of Orleans and/or National Bank of Commerce in New Or-

leans be and they are hereby authorized to release from the attachment and garnishments issued herein all funds belonging to defendants in National Bank of Commerce in New Orleans except \$50,000.00, representing part of the proceeds of the aforesaid draft for \$215,530.34, said sum of \$50,000.00 to be held, as required by law, subject to the further orders of this Court, and *

It is Further Ordered that the aforesaid release be and is hereby made without prejudice to any of plaintiff's rights in the premises.

Dated at New Orleans, Louisiana, this 15th day of May, 1935.

(Signed) WM. H. BYRNES, JR.,
Judge.

(Signed) COBB & JONES,
Attorneys for Mover.

Serve National Bank of Commerce.

New Orleans, 5/15, 1935.

A True Copy.

(Signed) E. Z. ADAMS,
Deputy Clerk, Civil District
Court, Parish of Orleans,
State of La.

Sheriff's Return.

Received Wednesday, May 15th, 1935, and on the 15th day of May, 1935, served a copy of the within Motion and Order on National Bank of Commerce defendant herein by personal service on O. G. Lucas, its President.

Returned same day.

Sheriff's Fee, .50¢.

(Signed) GUSTAVE P. PAUPART,
Deputy Sheriff of Orleans
Parish.

ANSWER OF GARNISHEE.

Filed May 17, 1935.

Civil District Court for the Parish of Orleans.

No. 212,370.

Division "E".

Docket 4.

William Helis
versus
Bryan Ward, et als.

Now into Court comes The National Bank of Commerce in New Orleans made Garnishee herein, and for answer to the interrogatories herein propounded by plaintiff says:

I.

In answer to the first interrogatory, garnishee says:

That garnishee received, on the morning of May 13, 1935, two drafts, one drawn by the Union National Bank, Houston, Texas, on William Helis, for \$215,530.34, with documents attached, and the other drawn on William Helis by Y. D. Spell, A. D. Mhoon, A. Y. Nitchell and Bryan Ward for \$1,918.90, with instructions to surrender the documents to the drawee, William Helis, upon payment; on May 14th, about 12 o'clock noon, the drawee paid the amount of both of the aforesaid drafts and received the documents thereto attached. Approximately ten minutes later, garnishee was served with the papers attaching and garnisheeing the funds. Subsequently, and on May 15th, at about 11:40 a. m., counsel for plaintiff delivered to garnishee a letter to the effect that \$50,000. of the amount attached and garnisheed was to be held

and the balance released, and at about 11:57 a. m., garnishee received an order from Court to the effect that all of the funds attached and garnisheed were to be released except \$50,000.

II.

In answer to the second interrogatory, garnishee says:

That the second interrogatory has been fully answered in the first interrogatory, and that garnishee was not indebted to any of the defendants in writ, except as set out in answer to the first interrogatory.

41

III.

In answer to the third interrogatory, garnishee says "No."

IV.

In answer to the fourth interrogatory, garnishee says "No."

Wherefore, garnishee, respondent herein, prays that this answer be deemed good and sufficient and that garnishee be dismissed hence with costs.

And for all equitable and general relief.

**THE NATIONAL BANK OF COM-
MERCE IN NEW ORLEANS,**

(Signed) By **W. J. MITCHELL,**
Vice-President.

Sworn to and subscribed before me, this 17th day of May, 1935.

(Seal and Signed) **HENRY SOUCHON,**
Notary Public.

(Signed) **MERRICK, SCHWARZ, GUSTE,
BARNETT & REDMANN,**

(Signed) By **RALPH SCHWARZ,**
Atty. for Garnishee.

ANSWER OF GARNISHEE.

Filed May 17, 1935.

**Civil District Court for the Parish of Orleans,
State of Louisiana.**

No. 212,370.

Division "E".

Docket 4.

**William Helis
versus
Bryan Ward, et als.**

Now into Court comes Federal Reserve Bank of Atlanta, New Orleans Branch, made garnishee herein; and, for answer to the interrogatories herein propounded by plaintiff, says:

I.

In answer to the first interrogatory, Garnishee answers "No."

II.

In answer to the second interrogatory, Garnishee answers "No."

III.

In answer to the third interrogatory, Garnishee answers "No."

IV.

In answer to the fourth interrogatory, Garnishee answers "No."

Wherefore, garnishee, respondent herein, prays that this answer be deemed good and sufficient and that he be dismissed with costs.

And for all equitable and general relief.

(Signed) **FEDERAL RESERVE BANK OF
ATLANTA, NEW ORLEANS
BRANCH,**

(Signed) By **JAMES A. WAILIN, ??**
Assistant Manager.

Sworn to and subscribed before me, at New Orleans, Louisiana, this 17th day of May, 1935.

(Seal and Signed) **HENRY SOUCHON,**
Notary Public.

(Signed) **MERRICK, SCHWARZ, GUSTE,
BARNETT & REDMANN,**

(Signed) By **RALPH SCHWARZ,**
Atts. for Garnishee.

43 **PETITION, AFFIDAVITS AND ORDER FOR
REMOVAL.**

Filed May 23, 1935.

Civil District Court for the Parish of Orleans,
State of Louisiana.

No. 212,370.

Division "E".

Docket 4.

William Helis

versus

Bryan Ward, et al.

To the Honorable the Judges of the Civil District Court
for the Parish of Orleans, State of Louisiana:

The petition of Bryan Ward, A. L. Mitchell, A. B.
Mhoon, Y. D. Spell, and The Union National Bank,

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Houston, Texas, defendants in the above entitled and numbered cause, respectfully shows:

1. Your petitioners show to this Honorable Court that they are the defendants, and the only defendants, in the above entitled and numbered cause, which is of a civil nature, and that the matter or amount in dispute in this cause exceeds the sum or value of Three Thousand Dollars exclusive of interest and costs; that the plaintiff, William Helis, was at the time of the commencement of this suit, and still is, a citizen of the State of Louisiana; that your petitioners Bryan Ward, A. L. Mitchel, A. B. Mhoon, and Y. D. Spell, defendants in said suit, were at the time of the commencement of said suit, are now, and at all times have been residents and citizens of Texas; and of no other state; that your petitioner, Union National Bank, of Houston, Texas, was at the time of the commencement of said suit, is not, and at all times has been a National Banking Corporation organized and existing under and by virtue of the National Banking Laws of the United States, having its only place of business in Houston, Harris County, Texas, and is a citizen of Texas, and of no other state, as affirmatively shown by plaintiff's petition filed in the above entitled and numbered cause.

That petitioners are each and all citizens and residents of said State of Texas, and of no other State, and particularly, are not, nor were they at the time of the institution of this suit, nor have they ever been residents of the State of Louisiana; and your petitioners desire
 44 to remove said suit before the trial thereof into the next District Court of the United States, to be held in the Eastern District of Louisiana, New Orleans Division.

2. That the time within which defendants are required by the laws of the State of Louisiana or the rules of this Court to answer or plead to the petition of plain-

tiff has not yet expired and your petitioners have not in any way appeared herein.

3. Your petitioners offer herewith a good and sufficient bond as provided by the statutes and rules in such cases, that they will enter in said United States District Court for the Eastern District of Louisiana, New Orleans Division, within thirty days from the filing of this petition, certified copy of the record in this suit, and that they will pay all costs which may be awarded in said Court, if the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

4. Due notice has been given to plaintiff, William Helis, of the filing of this petition and bond.

Your petitioners, appearing herein only for such purpose, therefore pray that this Honorable Court proceed no further whatever herein, except to make the order of removal as provided by law, and to accept this petition and the bond presented herewith and direct that a transcript of the record herein be made as provided by law, and in duty bound your petitioner will ever pray, etc.

BRYAN WARD,
A. L. MITCHELL,
A. B. MHOON,
Y. D. SPELL,

UNION NATIONAL BANK,
HOUSTON, TEXAS,
Petitioners,

By WM. N. BONNER, Sterling Bldg.,
Houston, Texas, Attorney.

(Signed) TERRIBERRY, YOUNG, RAULT
& CARROLL,

(Signed) WM. N. BONNER,
Attorneys for Petitioner.

(Signed) WM. N. BONNER,
Counsel.

45 The State of Texas,
County of Harris.

Bryan Ward and A. L. Mitchell, being duly sworn, on oath each for himself says: that he is one of the petitioners above named; that he has read the foregoing petition, and that the same is true of his own knowledge.

(Signed) BRYAN WARD,

(Signed) A. L. MITCHELL.

Subscribed and sworn to before me by Bryan Ward and A. L. Mitchell this 22nd of May, 1935.

(Seal and Signed) RUTH SMITH, ?

Notary Public, Harris County,
Texas.

State of Louisiana,
Parish of Orleans.

A. B. Mhoon, being duly sworn, on oath says that he is one of the petitioners above named; that he has read the foregoing petition, and that the same is true of his own knowledge.

(Signed) A. B. MHOON.

Subscribed and sworn to before me by A. B. Mhoon this 23rd day of May, 1935.

(Seal and Signed) WALTER L. CARROLL,

Notary Public, Parish of Orleans,
La.

State of Louisiana,
Parish of Orleans.

Wm. N. Bonner, being sworn, on oath says: That he is attorney for the defendants, petitioners, named in the foregoing petition; that he has read the same and believes the same to be true. That petitioner Union National Bank, Houston, Texas, is a corporation and is a non-resident of the State of Louisiana, and has no executive officer, and has no president, vice-president, secretary or

treasurer within the State of Louisiana, and that affiant
 46 make this affidavit for the reason that said peti-
 tioner has no such officer or agent whatever in
 the Parish of Orleans, State of Louisiana, where
 said suit is brought.

(Signed) WM. N. BONNER.

Sworn and sworn to before me by Wm. N. Bonner this
 23rd day of May, 1935.

(Signed) WALTER CARROLL,
 Notary Public, Parish of Orleans,
 La.

State of Louisiana,
 Parish of Orleans.

Wm. N. Bonner, being duly sworn, on oath states that
 he is attorney for each and all of the defendants, peti-
 tioners, named in the foregoing petition, to-wit, Bryan
 Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and
 Union National Bank, Houston, Texas; that he has read
 the foregoing petition, and that the same is true of his
 own knowledge.

(Signed) WM. N. BONNER.

Subscribed and sworn to before me by Wm. N. Bonner
 this 23rd day of May, 1935.

(Seal and Signed) WALTER CARROLL,
 Notary Public, Parish of Orleans,
 Louisiana.

State of Louisiana,
 Parish of Orleans.

Before me, the undersigned authority, personally came
 and appeared Andrew R. Martinez, who, being by me
 first duly sworn, did depose and say:

"I am a member of the firm of Terriberry, Young, Rault
 & Carroll, Attorneys for defendant and petitioner for re-

moval; I have read the foregoing petition for removal and the allegations therein contained are true and correct; affiant is authorized to make this affidavit and does so for the reason that petitioners do not reside in, and petitioners, except A. B. Mhoon, are not present within, the State of Louisiana.

(Signed) ANDREW R. MARTINEZ.

Sworn to and subscribed before me this 23rd day of May, 1935.

(Signed) WALTER CARROLL,
(Seal) Notary Public.

47

ORDER FOR REMOVAL.

Civil District Court for the Parish of Orleans,
State of Louisiana.

No. 212,370.

Division "E."

Docket No. ...

William Helis
versus
Bryan Ward, et al.

This cause coming on for hearing upon petition and bond of the defendants herein for an order transferring this cause to the United States District Court for the Eastern District of Louisiana, New Orleans Division, and it appearing to the Court that the defendants have filed their petition for such removal in due form of law, and that the defendants have filed their bond duly conditioned, with good and sufficient sureties, as provided by law, and that defendants have given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court, and that the time allowed for pleading has not expired;

Now, therefore, said petition and bond are hereby accepted and it is hereby ordered and adjudged that this cause be and it is removed to the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith; that all further proceedings of this Court be and they are hereby stayed.

Thus Done and Signed by me at New Orleans, Louisiana, this 23rd day of May, 1935. One o'clock P. M.

(Signed) WM. H. BYRNES, JR.,
Judge.

48

NOTICE OF REMOVAL.

Filed May 23rd, 1935.

Civil District Court for the Parish of Orleans,
State of Louisiana.

No. 212,370.

Division "E."

Docket 4.

William Helis
versus
Bryan Ward, et al.

To Messrs. Cobb and Jones,
Attorneys for Plaintiff:

Please take notice that the defendants, Bryan Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and Union National Bank, Houston, Texas, will on the 23rd day of May, 1935, at 1:00 P. M., or as soon thereafter as counsel can be heard, move the Court for an order removing said cause to the District Court of the United States for the

Eastern District of Louisiana, New Orleans Division, in accordance with the petition and bond of defendants, copies of which are hereto attached:

(Signed) WM. N. BONNER,

Sterling Bldg., Houston, Texas,
Attorneys for Petitioners.

(Signed) TERRIBERRY, YOUNG,
RAULT & CARROLL,
Counsel.

We hereby acknowledge receipt of the foregoing notice and of the copy of the petition for removal and of the bond therein described.

(Signed) COBB & JONES,

Attorneys for William Helis.
New Orleans, La., May 23, 1935.

49

BOND OF REMOVAL.

Filed May 23, 1935.

No. 212,370.

Division "E."

Docket 4.

Civil District Court for the Parish of Orleans,
State of Louisiana.

William Helis
versus
Bryan Ward, et al.

Know All Men By These Presents, That we, Bryan Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and Union National Bank, Houston, Texas, a corporation, as principals, and the other signer hereto as surety, are held

and firmly bound unto William Helis; plaintiff in the above entitled and numbered cause, his heirs, executors, administrators, and assigns, in the sum of Five Hundred Dollars lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, successors and representatives, jointly and severally by these presents.

The conditions of this obligation are such that, Whereas, the said Bryan Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and Union National Bank, Houston, Texas, have applied by petition to the Civil District Court for the Parish of Orleans, State of Louisiana, for the removal of a certain cause therein pending wherein William Helis is Plaintiff and Bryan Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and Union National Bank, Houston, Texas, are defendants, to the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, for further proceedings on grounds in said petition set forth, and that all further proceedings in said Civil District Court for the Parish of Orleans be stayed.

Now, Therefore, if your petitioners, the said Bryan Ward, A. L. Mitchell, A. B. Mhoon, Y. D. Spell, and Union National Bank, Houston, Texas, shall enter in said District Court of the United States, New Orleans Division, within thirty days from the date of filing said petition, a certified copy of the record in said suit, and

50 shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

In Testimony Whereof, the parties, principals and surety have caused this bond to be executed by affixing

hereto their signatures on this 22nd day of May, 1935,
the latter with its corporate seal affixed.

(Signed) BRYAN WARD,

(Signed) A. L. MITCHELL,

(Signed) Y. D. SPELL,

(Signed) By WM. N. BONNER, Agt. & Atty.

(Signed) UNION NATIONAL BANK,
HOUSTON, TEXAS,

(Signed) By WM. N. BONNER,
Principals, Atty. of Record &
Agent.

(Seal & Signed) NATIONAL SURETY CORPORA-
TION,

Surety,

(Signed) By E. R. BARROW,
Attorney in Fact.

Countersigned at New Orleans, La.,
By LOUIS COIRON,
Attorney-in-Fact.

51 POWER OF ATTORNEY ATTACHED TO BOND FOR REMOVAL.

Filed May 23rd, 1935.

Know All Men by These Presents, that National Surety Corporation, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N. Y., (hereinafter called the Corporation), hath made, constituted and appointed, and does by these make, constitute and appoint Gus. S. Wortham, B. F. Carruth, E. R. Barrow, Carle Aderman, H. M. Stewart and T. F. Smith, Jointly or Severally, of Houston, and State of Texas, its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to

execute, acknowledge and deliver any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; provided, however, that the penal sum of any one such instrument executed hereunder shall not exceed Two Hundred Thousand (\$200,000.00) Dollars, and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises. This Power of Attorney is made and executed pursuant to and by authority of the following By-Laws adopted by the Board of Directors of the Corporation at a meeting duly called and held on the 29th day of April, 1933.

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, Executive Vice-President or any Vice-President may, from time to time, appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and Act for and on behalf of the Corporation and the President, Executive Vice-President or any Vice-President, the Board of Directors or the Executive and Finance Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact, and also remove any of them from office.

"Section 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute, acknowledge and deliver for and in the name and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary.

"Section 7. Attorney-in-Fact. Attorneys-in-Fact are hereby authorized to verify and affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-Laws of the corporation of any Article of Section thereon.

In Witness Whereof, the Corporation has caused these presents to be signed by its Vice-President, attested by its Assistant Secretary and its corporate seal to be hereunto affixed this 25th day of June, A. D. 1934.

NATIONAL SURETY CORPORATION,

(Signed) By E. M. ALLEN,
(Seal) Vice-President.

Attest:

(Signed) FREDIC S. CONE,
Assistant Secretary.

State of New York,
County of New York, ss.:

On this 25th day of June, A. D. 1934, before me personally came E. M. Allen, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of National Surety Corporation, the corporation described in and which executed the above instrument; that he knows the seal of corporation; that the seal affixed to the said instrument is such corporation seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

(Signed) M. M. MILLER,
Notary Public.

53 State of New York,
County of New York, ss.:

I, H. Hussenetter, Resident Assistant Secretary of the National Surety Corporation, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said National Surety Corporation, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Corporation, at the City of New York, N. Y., this 23rd day of May, A. D. 1935.

(Signed) H. HUSSENETTER,
Resident Assistant Secretary.

54 CERTIFICATE OF CLERK OF CIVIL DIST.
COURT, PH. OF ORLEANS.

State of Louisiana.

Civil District Court for the Parish of Orleans,

I, John J. O'Neill, Clerk of the Civil District Court for the Parish of Orleans, Do Hereby Certify the foregoing fifty-five (55) pages do contain true and correct copies of the original documents on file and record among the Archives of this office in the matter entitled William Helis versus Bryan Ward, et als., No. 212,370 of the docket of this Court, as follows:

Chronological List of All Docket Entries in Chronological Order.

Petition, Affidavit and Order filed May 14th, 1935—
Page 2.

Interrogatories Attached to Original Petition, filed
May 14th, 1935—Page 18.

Interrogatories Attached to Original Petition, filed May 14th, 1935—Page 20.

Writ of Attachment and Sheriff's Return Thereon, issued May 14th, 1935—Page 22.

Bond for Writ of Attachment and Sequestration, issued May 14th, 1935—Page 24.

Citation to Post and Sheriff's Return Thereon, issued May 14th, 1935—Page 25.

Agreement, filed May 15th, 1935—Page 26.

Citation to Garnishee and Sheriff's Return Thereon, issued May 14th, 1935—Page 37.

Citation to Garnishee and Sheriff's Return Thereon, issued May 14th, 1935—Page 39.

Motion to Release Garnishee and Order, filed May 15th, 1935—Page 40.

Motion of William Helis and Sheriff's Return Thereon, filed May 15th, 1935—Page 42.

Answer of Garnishee, filed May 17th, 1935—Page 44.

Answer of Garnishee, filed May 17th, 1935—Page 46.

Petition, Affidavit and Order for Removal, filed May 23rd, 1935—Page 47.

Notice of Removal, filed May 23rd, 1935—Page 53.

Bond of Removal, filed May 23rd, 1935—Page 54.

Power of Attorney Attached to Bond for Removal, filed May 23rd, 1935—Page 56.

55 In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of New Orleans, this 27th day of May, in the year of our Lord, one thousand nine hundred and thirty-five and in the one hundred and fifty-ninth year of the Independence of the United States of America.

(Sgd.) JOHN J. O'NEILL,

(Seal) .

Clerk.

JOINT MOTION TO DISMISS AND ANSWER AND
CROSS-BILL OF DEFENDANTS.

56 Filed June 25, 1935.

In the United States District Court, in and for the Eastern
District of Louisiana, at New Orleans.

William Helis,

vs.

Equity No. 292.

Bryan Ward, et al.

To the Honorable Wayne G. Borah, Judge of said Court:

Come now the defendants in the above cause, Bryan Ward, A. L. Mitchell, L. B. Mhoon and Y. D. Spell, the first three named defendants being resident citizens of the State of Texas and County of Harris, and the last named defendant being a resident citizen of Jefferson County, Texas,

And thereupon, these defendants, in answer to the suit of the Complainant, say:

First.

These defendants respectfully suggest to the Court that the matters of fact set forth in the Complainant's

petition in this cause exhibit no cause of action against them requiring an answer on their behalf.

Wherefore, they move the Court to dismiss this cause as thus presented in the Complainant's petition, with costs of this proceeding to be taxed against him.

WM. N. BONNER,

Of Houston, Texas,

Solicitor for Defendants, Bryan

Ward, A. L. Mitchell and

L. B. Moon.

W. D. GORDON,

Of Beaumont, Texas,

Solicitor for Defendant, Y. D.

Spell.

57

Second.

In the event the foregoing motion to dismiss shall be denied and these defendants be further required to answer said proceeding instituted by the complainant herein, then, and only in such event, these defendants file the following answer to the complainant's suit:

(1) They admit the allegations of fact set forth in said petition in Paragraphs 1 to 9, inclusive, of the complainant's petition; denying, however, the conclusions of the pleader asserting such facts.

(2) They deny the allegations set forth, particularly the conclusions of the pleader, in Paragraphs 11, 12, 13, 14, 15 and 16 of said petition.

(3) They admit the allegations of fact, but deny the conclusions of the pleader, stated in Paragraph 17, of said petition, having no information as to the matters peculiarly within the knowledge of the complainant or petitioner, as alleged by him in Paragraphs 18, 19, 20, 21, 22 and 23, of said petition. Defendants rest upon a

general denial of such averments and leave the complainant or petitioner to prove of the same as alleged by him.

(4) Defendants deny the allegations of complainant, or petitioner, and particularly the construction placed upon the facts asserted by him as set forth in Paragraphs 24 and 25 of said petition; and they expressly deny that such paragraphs are correct in statement of the facts and the relations of the parties and the legal conclusions drawn in said paragraphs by the pleader, and require the proofs in support thereof to be presented as to the facts erroneously pleaded, as well as the legal conclusions therefrom erroneously there stated by the pleader.

(5) These defendants likewise deny the facts and conclusions set forth in Paragraphs 26 to 30, inclusive, leaving to the petitioner, or complainant, the establishment of such facts, if material to this cause, 58 which is denied, and the conclusions accompanying such statements, to be established upon a hearing of this cause. They therefore rest upon the denial of such facts and the conclusions asserted in connection therewith.

(6) As to the summary and conclusions at the end of said pleading of petitioner or complainant, these defendants explicitly deny that any right, claim or demand in law, or in equity, is assertable in this proceeding against them. They deny that the petitioner has any right or claim to any judgment or decree in any manner whatsoever against them, or against any other person or corporation through or under, or in privity with them in any manner, shape or form.

Accordingly, these defendants pray that said bill, or petition, against them be dismissed with prejudice, and that the costs thereof be decreed against the petitioner or complainant.

Third.

And now, by way of Cross-Bill and plea over against the petitioner, or complainant, these defendants assert against him the following cause of action and grounds of relief, and seek the remedies prayed for in the sub-joined prayer of this Cross-Bill, to-wit:

(a) It is true that these defendants are clothed with all the rights, privileges and demands incident to and growing out of the contract set forth in the foregoing petition of petitioner or complainant; that in pursuance of the terms thereof (the three first named defendants herein, being the successors in interest of the dissolved corporation which was a party to that contract), said Well No. 2, was drilled and became a producer of oil, greatly in excess as to capacity of 3000 barrels per day, which fact has been all along, from the completion of said well to the exercise of the option to purchase said property, and indeed up to the institution of this suit by petitioner, well known to have such productive capacity, and that under and by virtue of the terms of said contract he elected to purchase said property, where-
59 by he was required to pay the purchase price of \$400,000.00.

Well knowing such facts, petitioner conceived the unfair and inequitable design and purpose of perverting the truth as to the quantity of oil such well, under the terms of such contract, could produce in order to effectuate the acquisition thereof for a sum of money \$100,000.00 less than he was bound to pay therefor.

Moreover, in pursuance of such false and inequitable purpose and design on his part, he refused to comply with the conditions of said contract in reference to making a test preliminary to the exercise of his option, whereby the truth might be determined, and accordingly set about to avoid and avert the true situation from

appearing, and upon which, the fact being shown, he was undeniably bound and obligated to pay the said sum of \$400,000.00 in purchase of said property. And all allegations made in his petition to the contrary of the facts here alleged are baseless in fact and are made for the purpose of effectuating such inequitable, unfair and untrue conditions thereby to enable him under such pretenses to obtain these defendants' property for a sum of money far less than the contract price stipulated to be paid them.

It was in pursuance of such purpose and design on his part that he conceived the plan of exercising the option under said contract, paying in the amount of money correctly stipulated to be paid as hereinbefore stated, and as shown in said contract, and then after securing the title and possession of the property of the defendants attaching under the processes evidenced in this record the money of these defendants in the State Court of Louisiana, thereby seizing and impounding the same under such processes of law in order to compel the defendants to yield to his purposes and designs so inequitably conceived and exercised.

Thereby these defendants have been deprived of their property through such false and fraudulent schemes and designs and forced into this litigation to secure and protect and safeguard their rights.

60 In the meantime, he having thus secured the defendants' property, and assumed possession thereof, is exploiting the same wholly without regard to the restraints imposed by the State of Louisiana against excessive production and sale of oil therefrom, and without regard to the contractual rights of these defendants as to the \$200,000.00 due and payable to them under their contract out of such oil when and as produced. To this end he has produced and sold, and appropriated the proceeds to his exclusive use, approximately one hundred

and fifty thousand (150,000) barrels of said oil, in violation of the contractual rights of these cross-complainants, receiving therefor approximately \$1.00 per barrel, thus depriving them of their security for the deferred payments of \$200,000.00 provided in said contract.

Such situation, therefore, presents a case for the exercise of the summary powers of this Honorable Court to grant to these defendants ancillary relief through the appointment of a receiver, or other agency of the Court, to take custody and possession of said property, in whole or in part, in such manner as to adequately conserve and protect the same to the extent of the defendants' interests, as herein set forth and alleged.

(b) These defendants stand ready to prove the truth, as they have at all times offered to do, in full compliance with the spirit and the letter of their contract with the petitioner; and here tender such proof, upon a hearing of this cause, that said well was of that capacity, quantity and character, capable of producing within the terms and specifications of said contract, an amount greatly in excess of 3000 barrels of oil per day; and therefore petitioner was bound and obligated, upon the exercise of his option to purchase said property, to pay to these defendants the sum of \$400,000.00 in accordance with the terms and conditions of said contract; all of which terms and conditions these defendants have stood ready and willing to comply with, and all of which conditions and terms petitioner has failed and refused to comply with, under and pursuant to the artful, inequitable and false contentions put forth by him in this proceeding; and under and by which he has succeeded in taking from these defendants their property rights. These things defendants here stand ready to verify upon a trial of this cause.

(c) If, therefore, the defendants are mistaken in any of the facts averred in this cross-bill against the peti-

tioner, and are not entitled, as hereunder prayed for, to have a decree specifically performing said contract; and if such contract is duplicitous in any respect, and the minds of the parties did not meet thereon in accordance with the terms and conditions thereof, as herein set forth in this pleading, then, and in such case, these defendants, if not entitled to specific performance and to have decreed and enforced full compliance therewith by the petitioner, as herein alleged, they ask that said contract be rescinded, canceled and annulled, and that they have a decree to this effect, together with an accounting of all the oil taken and appropriated by the complainant or petitioner, with legal interest thereon, and for all other damages and expenses reasonably incident to this matter, and that such decree award to them full relief, including a restoration of said property and compensation for its distraint and appropriation on the part of petitioner.

Wherefore, these defendants, as cross-complainants against the petitioner as cross-defendant, pray for the following relief:

(1) That they be granted a decree compelling said cross-defendant to specific performance of said contract upon the purchase price basis of \$400,000.00 as therein set forth and hereinbefore alleged, and that the decree award to them the sum of money now
62 due and under the distraint of judicial processes sued out in the State Court, which are here asked to be annulled and vacated, together with interest and all reasonable costs.

(2) That if not entitled to the relief above prayed for, that a decree be rendered canceling, rescinding and annulling said transaction and restoring to these cross-complainants the title and possession of said property,

together with all monies had and received by the cross-defendant from the production of oil appropriated and converted by him, together with interest, and all such other costs as in equity should be decreed against him.

(3) They also pray that this Honorable Court, pending this proceeding and its final adjudication, appoint a receiver of the funds in controversy in this suit, under such limitations and provisions in the order as will safeguard the rights of the parties hereto, whether such receivership be of the whole of said property or such proportionate part thereof as in the judgment of the Court is deemed equitable and just.

(4) And, finally, that they have such other and further relief, whether the same be general or special in its nature, and whether herein specially prayed for or not, as in equity they ought to have and receive at the hands of this Honorable Court.

And to the end that they may have such relief as herein prayed for, or as the Court may deem just and equitable, they submit themselves to its jurisdiction and offer to do and perform any and all things which they ought to do, or which equity lays upon them as a condition precedent to the granting of such relief; and as in duty bound, they will ever pray.

(Sgd.)

W. N. BONNER,

(Sgd.)

W. D. GORDON,

Solicitors for Cross-Complainants.

62-a **HEARING ON MOTION TO DISMISS AND
CONTINUANCE.**

Extract from Equity Journal,
November Term, 1936.

New Orleans, Thursday, January 28th, 1937.

Court met pursuant to adjournment.

Present: Hon. Wayne G. Borah, Judge.

Present: Hon. John W. Holland, Judge.

Proceedings before Honorable Wayne G. Borah,
District Judge.

(Title Omitted.)

This cause came on this day to be heard upon the motion to dismiss filed on behalf of the defendants and cross-complainant as well as upon the motion of the defendants for authority to file an amended and substituted cross-bill of complaint,

Present: Andrew R. Martinez, Attorney for defendant, mover.

Present: Lloyd J. Cobb, Attorney for Plaintiff.

Whereupon, after hearing statements of counsel for the respective parties, the matter was continued until to-morrow at 10 o'clock, A. M., for further proceedings.

ORDER OVERRULING MOTION TO DISMISS CROSS-BILL AND AMENDED AND SUBSTITUTED BILL OF COMPLAINT.

62-b Extract from Equity Journal,

November Term, 1936.

New Orleans, Friday, January 29th, 1937.

Court met pursuant to adjournment.

Present: Hon. Wayne G. Borah, Judge.

Present: Hon. John W. Holland, Judge.

Proceedings before Hon. Wayne G. Borah, District Judge.

(Title Omitted.)

The Court, after hearing argument of counsel on the motion to dismiss the original cross-bill of complaint as amended and substituted by the amended and substituted bill of complaint, and considering the law and the evidence to be against sustaining motion to dismiss,

It is Ordered that the motion to dismiss the cross-bill of complaint and the amended and substituted cross-bill of complaint be and the same is hereby overruled.

MINUTE ENTRY OF ORDER OVERRULING DEFENDANTS' MOTIONS TO DISMISS.

63 May Term, 1936.

New Orleans, Friday, October 2nd, 1936.

Court met pursuant to adjournment.

Present: Hon. Wayne G. Borah, Judge.

William Helis,

versus

No. 292—Equity.
Bryan Ward, et als.

This cause came on at a former day to be heard upon the motion filed on behalf of the defendants to dismiss

the bill of the plaintiff herein and after hearing arguments of counsel for the respective parties, the matter was submitted and the Court took time to consider.

Whereupon, and upon due consideration thereof, for the reasons orally assigned;

It is Ordered that the motions filed on behalf of the defendants to dismiss the bill of the plaintiff be, and the same are hereby, Overruled.

**JOINT MOTION OF PLAINTIFF AND DEFENDANT,
Y. D. SPELL, AND ORDER THAT NATIONAL
BANK OF COMMERCE IN NEW ORLEANS PAY
SPELL ONE-THIRD OF FUND UNDER SEIZURE.**

64

Filed Sept. 10, 1936.

(Number and Title Omitted.)

To the Honorable Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana:

On joint motion of William Helis, plaintiff herein, through his attorneys, Cobb & Jones, and Y. D. Spell, in propria persona, a defendant herein, and on suggesting to the Court that since the issuance of the attachment herein the property involved in this litigation has produced sufficient oil that the amount under seizure herein, to-wit, the sum of Fifty Thousand (\$50,000.00) Dollars, plus the sums heretofore paid defendants out of the proceeds of such oil aggregate the minimum purchase price of Three Hundred Thousand (\$300,000.00) Dollars due under the contract in litigation herein and that Mover, William Helis, desires to release one-third of the sum under attachment or Sixteen Thousand Six Hundred and Sixty Six Dollars & 67/100 (\$16,666.67) to which Y. D. Spell is

presently entitled as his proportion of the original alleged over payment of Fifty Thousand (\$50,000.00) Dollars which said fund was seized under said attachment and is now in the possession of The National Bank of Commerce in New Orleans, the said release being made with the distinct understanding and agreement on the part of Mover, Y. D. Spell, that William Helis shall be and is hereby released from any and all liability with respect to the payment of the minimum purchase price due under said contract or Three Hundred Thousand (\$300,000.00) Dollars so far as Y. D. Spell is concerned, and that Y. D. Spell waives and releases William Helis from any claim for interest or other demand of any kind or character whatsoever growing out of the issuance of said attachment and the seizure of the aforesaid funds and, further,

65 that the rights of Mover, Y. D. Spell, if any he has, and Mover, William Helis, expressly denies that he has any legal right or claim to any additional sums, shall be fixed, determined and governed exclusively by any definitive adjudication herein controlling the rights of the other defendants and in the event the said other defendants bring any other proceedings, Y. D. Spell agrees to abide by any definitive judgment therein rendered fixing the rights of the parties under said contract.

It is Ordered, Adjudged and Decreed, that the main demand of Mover, William Helis, so far as Mover, Y. D. Spell is concerned, be and the same is hereby dismissed and that the National Bank of Commerce in New Orleans be and it is hereby ordered to pay over to Y. D. Spell one-third ($1/3$) of the fund of Fifty Thousand (\$50,000.00) Dollars under seizure or Sixteen Thousand Six Hundred and Sixty-Six Dollars & $67/100$ (\$16,666.67) and that such other rights as Movers may have shall be controlled solely by the agreement hereinbefore set forth and that this order shall be without prejudice to any rights of other litigants herein.

Signed at New Orleans, Louisiana, this 10th day of
September, 1936.

(Signed) WAYNE G. BORAH, Judge,

WILLIAM HELIS,

By (Sgd.) COBB & JONES,

His Attorneys.

(Sgd.) Y. D. SPELL,

In Propria Persona.

66 State of Louisiana,
Parish of Orleans.

Before me, the undersigned authority, a Notary Public
duly commissioned and qualified in and for the Parish
and State aforesaid,

Personally came and appeared, Y. D. Spell, a person
well known to me, Notary, who being by me first duly
sworn, did depose and say that:-

He is a Mover in the above and foregoing motion and
that he has read the same and all of the facts and allega-
tions therein contained are true and correct and that
his counsel, Judge W. D. Gordon of Beaumont, Texas,
approved the form of the said motion prior to the filing
thereof, said approval being by telegraphic advices to
Messrs. Cobb & Jones, Attorneys for Mover, William
Helis, affiant's counsel, Judge W. D. Gordon, being in
Beaumont, Texas, at the time.

(Sgd.) Y. D. SPELL.

Sworn to and subscribed before me this 5th day of
September, 1936.

(Sgd.) RUTH WALZER DUFFY,

(Seal) Notary Public.

MOTION OF PLAINTIFF TO DISMISS.

Filed Jan. 20, 1937.

67

(Number and Title Omitted.)

To the Honorable Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana:

On motion of William Helis, plaintiff herein, through his attorneys, Cobb & Jones, and on suggesting to the Court that plaintiff desires to dismiss his main demand herein without prejudice to any rights which the litigants may have in the subject matter of this litigation and with costs to be taxed against the plaintiff, Mover. However, specifically denying that defendants have any rights or claims herein or that the pleadings herein filed by them set forth any claim or right cognizable in equity:

It Is Ordered, Adjudged and Decreed that Mover's bill of complaint herein be and it is hereby dismissed without prejudice and without any adjudication by this Court of the issue involved, all costs herein to be taxed against Mover, and said dismissal to be without prejudice to any rights which the defendants may have under the pleadings filed by them herein or otherwise.

Signed at New Orleans, Louisiana, this 20th day of January, 1937.

(Sgd.) WAYNE G. BORAH,
Judge.

WILLIAM HELIS,
(Sgd.) By COBB & JONES,
His Attorneys.

MOTION OF PLAINTIFF TO DISMISS CROSS-BILL.

Filed Jan. 27, 1937.

68

(Number and Title Omitted.)

To the Honorable Wayne G. Borah Judge of the United States District Court for the Eastern District of Louisiana:

Now into Court comes William Helis, plaintiff in the above entitled cause, through his attorneys, Cobb & Jones and says:

I.

That the original demand of plaintiff as set forth in his petition filed herein was dismissed on January 20, 1937 and as a result thereof the cross-bill of defendants should likewise be dismissed for the reason that it must follow the fate of plaintiff's original demand.

II.

Now in the alternative plaintiff, without in any manner waiving his rights under the foregoing motion to dismiss defendants' cross-bill, but specifically reserving all rights under said motion, says that in the event this Honorable Court should hold that the aforesaid cross-bill did not fall with the dismissal of plaintiff's petition that said cross-bill does not state any matter of equity entitling the defendants to the relief prayed for in said cross-bill, nor do the facts set out in said cross-bill exhibit a cause of action sufficient to entitle defendants to any relief of an equitable nature against plaintiff, or otherwise.

III.

Plaintiff, specifically reserving the benefits of the foregoing motions, now says as an alternative plea,

that said cross-bill is multifarious and contains a misjoinder of causes of action in that defendants have prayed for specific performance of the contract between the litigants and in the alternative have prayed that said contract be rescinded, concealed and annulled.

Wherefore, plaintiff prays that the cross-bill
 69 filed by defendants herein be dismissed with prejudice and at their costs and in the alternative and only in the event the foregoing motions to dismiss be not sustained that the foregoing plea of multifariousness be sustained and that defendants be compelled to amend their cross-bill by striking out either the prayer for specific performance of the contract or the prayer that said contract be annulled.

(Sgd.) COBB & JONES,
 Attorneys for Plaintiff.

ANSWER OF WILLIAM HELIS TO CROSS-BILL.

Filed Feb. 18, 1937.

70 (Number and Title Omitted.)

To the Honorable Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana:

Now into Court comes William Helis, sought to be made defendant in the amended and substituted bill allowed to be filed by this Honorable Court on the 29th day of January, 1937 over the objection of defendant, and reserving the benefit of said objection and excepting to the ruling of the Court with respect thereto, for answer to the bill, says:

I.

For lack of sufficient information to justify a belief, defendant denies that complainants are now clothed

with any right, privileges and demands incident to and growing out of the contract set forth in the original petition filed by defendant in these proceedings, and defendant denies that complainants are successors in interest to the dissolved Iberia Oil Corporation. Defendant denies that the well referred to by complainants as "Well No. 2" or any well pertinent to said contract and which was drilled in compliance therewith became or now is within the meaning and intendment of the said contract of February 6, 1935, a producer capable of producing in excess of 3,000 barrels of oil per day.

Defendant avers that the applicable purchase price due under the aforesaid contract must be determined strictly in accordance with the terms and provisions of the said contract itself.

Defendant denies that since the execution of the contract dated February 6, 1935 the property therein described has been vested in complainants herein.

II.

Defendant denies that the contract dated February 6, 1935 was prepared by him and his counsel as to the terms employed therein and expressly avers
71 that counsel for complainants, Judge William Bonner, participated in the negotiations antecedent to the execution of the said contract and that the said contract was prepared jointly by the litigants herein and their respective counsel and was executed in the office of said Judge William Bonner at Houston, Texas, and that complainants were represented by said counsel at all times material herein.

Defendant admits that complainants executed a deed of assignment at Houston, Texas, dated May 11, 1935, but denies that said instrument was executed at the re-

quest of defendant herein. Defendant specially avers that complainants were under a legal duty under said contract to execute the said assignment and that the said assignment was executed in compliance with said contract.

Defendant denies that the well referred to by complainants as "Well No. 2, known as Bernard No. 2", was completed on or about the first day of April, 1935, producing the quantity of oil alleged by complainants and defendant denies that the said No. 1 Well had or has a production in excess of 160 barrels of oil per day.

III.

Defendant denies that he authorized the complainants to draw a draft on him through the Union National Bank of Houston, Texas, payable to their order at the National Bank of Commerce in New Orleans, Louisiana. Defendant denies that at any time was it his intent, purpose and design not to carry out and comply with the terms of the contract of February 6, 1935, and avers that in fact he did at all times strictly comply with all the provisions thereof. Defendant denies that at any time, by judicial action or otherwise, he repudiated or annulled the contract of February 6, 1935, or any act or thing done by him thereunder, and expressly avers that at all times he strictly complied therewith, and

72 that the overpayment of the purchase price as set forth in defendant's main demand was made to protect defendant's rights under the contract and prevent irreparable injury and damage to him and that said attachment was obtained in the exercise of defendant's legal rights in the premises for the purposes aforesaid.

Defendant denies that at any time did he do any act or thing not in conformity with the contract and denies that he obtained possession of the complainant's deed

of conveyance in any other manner except as the said contract of February 6, 1935 permitted.

Defendant admits that since about April 1, 1935, he has been in the actual, physical possession of the premises covered by the contract of February, 6, 1935, and denies that he has been in possession of said property wrongfully, and on the contrary defendant avers that he has a valid right and title thereto and to the production of oil therefrom, and further denies that complainants have or had any interest in oil produced therefrom except as stipulated in the contract of February 6, 1935 and defendant denies that complainants are entitled to an accounting for the production of oil from said property. Defendant specifically denies that his acts or actions have been such as to estop him from claiming the benefits of the said contract and alleges that he has always acted conformably to said contract and his rights thereunder.

IV.

Defendant denies that at any time material herein he ever refused to comply with the terms of the contract of February 6, 1935 and on the contrary expressly avers that said contract has always been complied with by him, and that all acts and things done by him and material to the issues herein involved were in the exercise of his legal rights under said contract of February 6, 1935.

73 Defendant denies specifically all other allegations contained in Paragraph IV of the complainants' bill.

V.

Defendant denies all and singular the allegations of Paragraph V of complainants' bill.

VI.

Defendant denies all and singular the allegations of Paragraph VI of complainants' bill.

VII.

Further answering, defendant avers:

That at the time the contract of February 6, 1935 was executed complainants were then drilling a well on the aforesaid premises known as Bernard No. 2; that the said well was a dry hole; that defendant's well was a producer and that as soon as it was placed on production complainants realized the value of defendant's discovery and conceived the unconscionable and inequitable design of preventing defendant from exercising the option to him granted by the contract of February 6, 1935 to purchase the leasehold estate; that in furtherance of said scheme complainants failed and refused to market the oil being produced by defendant, though requested so to do, and attempted to prevent defendant from transporting said oil to market which was necessary by reason of limited lease storage facilities; that complainants never attempted to make the test required to be made by the contract to determine the applicable purchase price but, on the contrary, assumed an arbitrary and studied attitude with respect to said contract in order to bludgeon defendant into a coercive payment not due under the contract; that complainants dissolved the Iberia Oil Corporation for the purpose of forcing defendant into litigation with non-residents of the State of Louisiana and compelling defendant to pursue his remedies against said non-residents in Texas under strange laws; that complainants conceived the false, unconscionable and inequitable design of having the well tested in a manner not in conformity with the contract; that at all times material herein and particularly at the time defendant exercised his option to purchase the property, defendant frankly and fully informed complainants of what he insisted were his legal rights in the premises, and that at no time did he make any statement or representation to complainants which was not true or which was not strictly

in accordance with the terms of the contract of February 6th, 1935; that defendant was compelled to make the payment of \$200,000.00 claimed by complainants as the initial cash portion of the purchase price in order to protect himself from irreparable injury for otherwise complainants would have been in a position to effectuate their unlawful design to harass and annoy defendant by troublesome litigation at great cost and expense and irreparable injury and thereby bludgeon defendant into a further payment not due under the contract; that in the letter directed to complainants by defendant on the 7th day of May, 1935, in which defendant exercised the option granted to him by the contract of February 6, 1935, defendant insisted that the applicable and proper purchase price under the terms of the aforesaid contract was \$300,000.00 and that payments which would be made by defendant were to be applied to the correct purchase price as thereafter determined; that defendant never indicated in any manner to complainants his acceptance of their contention that the correct purchase price was \$400,000.00, but on the contrary specifically stated in the aforesaid letter of May 7, 1935 that at the time required by the contract he would pay in cash fifty per cent. of the maximum purchase price of \$400,000.00, with full reservation of his rights by virtue of the aforesaid contract; that the attachment suit brought by defendant was for the recovery of an overpayment of \$50,000.00, which defendant was wrongfully compelled to pay in order to vindicate his legal rights under the contract of February 6, 1935; that complainants have acquiesced and consented to the transfer to defendant of title to the leasehold estate by receiving the balance of the purchase price properly due under the contract out of the oil produced from the said property and with recognition of defendant's title to said oil, and it was not until January 28, 1937 in the amended and substituted bill of complaint allowed to be filed by this Honorable Court on January 29, 1937, or almost two years after the assignment was executed in favor of

defendant, that complainants for the first time seriously contended that defendant did not acquire good and valid title to the leasehold estate, notwithstanding that throughout this period complainants have always known, as they know now, that defendant was and is in possession of the property, expending large sums of money in developing it for mineral purposes.

That since the filing of this suit one of the complainants, Y. D. Spell, has accepted his proportion of the funds originally seized, and in so doing has thereby admitted that defendant has a good and valid title to the leasehold estate; that complainants cannot in equity assert an estoppel unless they offer to restore and actually restore defendant to the position he occupied at the time the contract of February 6, 1935 was executed and the option therein contained exercised and which complainants have failed to do and are unable to do.

Wherefore, defendant prays that the bill of complainant be dismissed with prejudice and at the cost of complainants herein and defendant further prays for all full, general and equitable relief such as the nature of the case may require and law or equity may permit.

(Sgd.) COBB & JONES,
Attorneys for Defendant.

MINUTE ENTRY OF HEARING OF CASE AND SUBMISSION, FEBRUARY TERM, 1937.

76 . . . New Orleans, Friday, February 26th, 1937,

Court met pursuant to adjournment,

Present: Hon. Wayne G. Borah, Judge.

No. 292—Equity—William Helis vs. Bryan Ward, Et Als.

This cause came on this day to be heard upon the cross-complaint filed on behalf of the defendants as well as

upon the answer filed thereto on behalf of the plaintiff, and cross-defendant herein,

Present: W. N. Bonner, W. D. Gordon and Andrew R. Martinez, Esqs., Attorneys for the cross-complainants, herein,

Present: Lloyd J. Cobb, Esq., Attorney for the cross-defendant,

Whereupon, after hearing the pleadings, evidence and testimony offered on behalf of the respective parties and the arguments of counsel, the matter was submitted, when the Court took time to consider.

MOTION AND ORDER THAT MRS. ITASCA KINNEY WARD, EXECUTRIX, BE MADE PARTY PLAINTIFF.

77

Filed Apr. 16, 1937.

(Number and Title Omitted.)

To the Honorable Wayne G. Borah, Judge of said Court:

On Motion of Mrs. Itasca Kinney Ward, through her attorneys, William N. Bonner, W. D. Gordon, and Terri-berry, Young, Rault & Carroll, and

On Suggesting To The Court that Bryan Ward, one of the complainants herein, departed this life on February 27, 1937; that his succession has been opened in the County Court of Harris County, Texas, the proceedings being entitled "Matter of the Estate of Bryan Ward, Deceased," No. 24325 of the docket of said Court, and

On Further Suggesting To The Court that under the terms of the last will and testament of the deceased,

Bryan Ward, mover was named and appointed executrix of his last will and testament, a duly certified copy whereof is filed herewith, and that letters testamentary as such executrix were issued to her on..... 1937, a duly certified copy of which letters testamentary are also filed herewith, and

On Further Suggesting To The Court that Mrs. Itasca Kinney Ward, as executrix of the estate of Bryan Ward, deceased, desires to be made a party plaintiff in these proceedings and to be authorized to prosecute this suit and to stand in judgment therein in the same manner as the deceased himself could have done.

It Is Ordered By The Court that Mrs. Itasca Kinney Ward, as executrix of the estate of Bryan Ward, deceased, one of the plaintiffs herein, be and she is hereby made a party plaintiff to this suit and she is authorized to prosecute this action in the same manner as the said deceased plaintiff, Bryan Ward, himself could have done, and to stand in judgment therein.

New Orleans, Louisiana, April 16, 1937.

(Sgd.) WAYNE G. BORAH,
Judge.

78 State of Texas,
County of Harris.

Before me, the undersigned authority, personally came and appeared Mrs. Itasca Kinney Ward, who, being duly sworn, according to law, did depose and say:

That she is the widow of the late Bryan Ward, one of the plaintiffs in the suit entitled "William Helis vs. Bryan Ward et al" No. 292 in Equity in the United States District Court for the Eastern District of Louisiana, New Orleans Division, now pending before said Court; that her said husband, Bryan Ward, departed this life on February 27, 1937 and that affiant has been duly named as testa-

mentary executrix of his last will and testament, which has been duly probated in the County Court of Harris County, Texas, in the matter of the Estate of Bryan Ward, deceased, No. 24325 of the docket of said Court, and that letters testamentary have issued to affiant by said Court on....., 1937.

(Sgd.) MRS. ITASCA KINNEY WARD.

Sworn to and Subscribed Before me this 12th day of April, 1937.

(Sgd.) AILEEN ALVERSON,
Notary Public.

(Seal)

79

OPINION.

Filed Sept. 3, 1937.

(Number and Title Omitted.)

W. N. Bonner, W. D. Gordon and Andrew R. Martinez.

Lloyd J. Cobb, Esq.,

BORAH, District Judge:

This controversy involves primarily the interpretation of a contract to determine the applicable purchase price due thereunder. The contract in question was in reality an option to purchase an oil, gas and mineral lease covering land located in Louisiana, and it was provided that the option should be consummated in Louisiana. Under these circumstances the law of Louisiana governs, notwithstanding the fact that this contract was made and executed in the State of Texas.

The record supports the following conclusions as to the material facts. On February 6, 1935, William Helis

entered into a written agreement with Iberia Oil Corporation and Y. D. Spell for the purchase of their interest in a mineral lease dated September 28, 1931, covering a certain tract of land situated in the Little Bayou Oil Field in Iberia Parish, Louisiana. When this lease was executed Iberia Oil Corporation and Y. D. Spell had a producing oil well on their property known as Bernard No. 1 and were in process of drilling another well known as Bernard No. 2, and under the terms of the contract of February 6, 1935, Helis agreed to drill a third well at his own expense to be known as the Bernard No. 3 well. It was stipulated that in the event either the Bernard No. 2 well or the Bernard No. 3 well should be brought in as a producer, that Helis was given the right under said contract to acquire the mineral lease in accordance with the terms and provisions set forth in paragraphs 3 and 4 of said agreement, which are as follows:

"3. At any time prior to the expiration of the options herein granted, Second Party shall have the right to purchase the afore-described mineral lease and all rights thereunder, including all oil produced from the Bernard No. 1 Well from the date of completion of the Bernard No. 2 well as follows;

80 "(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in guaging the capacity of oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

"The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of 1/4th of 7/8ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property.

"First Parties agree that any existing oil payments shall be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by Second Party; it being the intention of the parties that Second Party shall acquire the full 7/8ths working interest of First Parties free and clear of any and all liens and encumbrances whatsoever.

"4. In addition to the applicable purchase price to be paid by Second Party, as above set forth, Second Party shall also pay to First Party, in the event any option granted herein is exercised, the actual cost incurred by First Parties in the drilling of the Bernard No. 2 well, whether the said well is a producer or not, and Second Party shall pay, whether the aforesaid option to purchase be exercised or not, the entire cost of drilling and completing the Bernard No. 3 well, which shall be solely for account of Second Party and free of any obligation whatever to First Parties. In drilling said well No. 3 as above provided, Second Party will pay all bills as they accrue and protect First Parties and the leasehold estate against the filing of any liens."

Pursuant to and in accordance with the provisions of said contract, Helis moved his equipment onto the premises and drilled the Bernard No. 3 well to a depth of approximately 4,092 feet, but it was not a producer. The Iberia Oil Company and Y. D. Spell in the meantime continued drilling their Bernard No. 2 well, as they were obliged to do, and on or before April 1, 1935, finally abandoned same as a dry hole.

On April 1, 1935, the contracting parties entered into a supplemental agreement by the

terms of which Helis obligated himself to continue drilling to at least 4,800 feet. Helis continued drilling and on April 21, 1935, his Bernard No. 3 well was brought in as a producer. Immediately after the well was placed on production, and prior to any test as to capacity, Iberia Oil Company and Y. D. Spell asserted a claim for the maximum purchase price of \$400,000.00. Helis insisted that the capacity of the well, determined in accordance with the provisions of the contract, that is on a 3/8 inch choke, was less than 3000 barrels of oil per day and that the applicable purchase price was \$300,000.

On April 26, 1935, Iberia Oil Company and Y. D. Spell designated E. O. Buck, a petroleum engineer, as their representative to make a test to determine the capacity of the well. Helis had previously indicated his willingness to make the test in accordance with the terms of the contract, but the evidence does not establish that he participated in the test subsequently conducted by Buck. On April 29, 1935, Buck rendered a report based on his observation of the well on two different days and on various chokes ranging in size up to 1/2 inch, and stated that his observations on these several chokes were such that he was of opinion the Bernard No. 3 well would produce in excess of 3,000 barrels per day on any choke as large as a 5/8 inch choke. Buck's report, a copy of which was sent to Helis, definitely stated that the well was incapable of producing 3,000 barrels of oil per day on a 3/8 inch choke, which is the size choke stipulated in the contract.

On May 2, 1935, Iberia Oil Corporation was dissolved and its assets transferred to Bryan Ward, A. L. Mitchell and L. B. Mhoon.

A rider to the contract of February 6, 1935, provided for the appointment of an umpire in the event the parties failed to agree on the proper gauge on the well or wells and acting thereunder, and over the protest of Helis, W. A. Massey, a petroleum engineer, was designated. Massey, in company with Buck, conducted a test and on May 6, 1935, reported in writing that observations on chokes varying in size from 1/4 to 5/8

of an inch caused him to concur in Buck's report. He also stated definitely that the well could not produce 3,000 barrels of oil per day on a 3/8 inch choke.

Under the contract Helis was required to accept or reject the option to purchase the mineral lease within two days after the expiration of a test period of fifteen days following the completion of the well, and his failure to do so would have resulted in the forfeiture of all his rights under the contract, and the Bernard No. 3 well would have become the sole property of Messrs. Ward, Mhoon, Mitchell and Spell. Conformably to the contract provisions, Helis exercised his option to purchase by registered letter, wherein he reiterated his insistence that the applicable purchase price was \$300,000. However, in order to protect his rights and minimize his losses, Helis advised the sellers that his exercise of the option was to be construed to apply to whichever purchase price was applicable, and that if they insisted on the payment of the maximum price of \$400,000., he would comply with their demand with full reservation of his rights under the agreement.

In due course and in keeping with the terms of the contract, Messrs. Ward, Mitchell, Mhoon and Spell forwarded to the National Bank of Commerce in New Orleans an assignment of the mineral lease, together with two drafts, one for \$215,530.34 and another for \$1,918.90. The purchase price of the lease was payable 50% in cash and the balance out of oil to be produced, and the draft for \$215,530.34 represented 50% of the maximum purchase price of \$400,000., plus \$15,530.34 which the sellers claimed represented the actual costs incurred in drilling the Bernard No. 2 well. The draft for \$1,918.90 represented fuel oil consumed in the drilling of the Bernard No. 3 well and which Helis had agreed to pay. These drafts were paid on May 13, 1935, and Helis received the assignment of the lease and recorded same in the conveyance records of Iberia Parish, Louisiana.

On paying the drafts Helis immediately instituted an attachment suit in the Civil District Court for the Parish

of Orleans to recover the sum of \$50,000., being the difference between what he considered the correct cash portion of the purchase price, namely, \$150,000., and the amount of \$200,000. which was actually paid. Funds in the National Bank of Commerce in New Orleans belonging to the sellers were seized but immediately thereafter the excess of the seized funds over \$50,000. was released. The attachment suit was thereafter removed to this Court and during the course of these proceedings the suit was voluntarily dismissed by Helis without prejudice to the rights of defendants, when it appeared that the amount overpaid, plus sums due the sellers out of oil production aggregated the purchase price of \$300,000. Because of complainant's action in dismissing his petition and complaint against the defendants and cross complainants, Messrs. Ward, Mitchell, Mhoon and Spell were permitted to file in lieu of their cross bill and complaint an amended and substituted bill denominating themselves as complainants and the said William Helis as defendant. They pray for a decree canceling said transaction and restoring to complainants the title and possession of said property on the theory that defendant's conduct estops him from claiming the complainants' property; or if not entitled to this relief complainants further pray that the purchase price of said property be fixed at \$400,000.

After Helis acquired the leasehold estate, the oil production was sold and the balance of the proceeds of the sale were paid to him, and in conformance to the contract he paid to the sellers in proportion to their interests the balance due on the basis of a purchase price of \$300,000., and these payments were received without objection. Helis deducted from the purchase price the sum of \$3,111.09 to reimburse him for a similar amount which he had paid to cover the cost of drilling the Bernard No. 2 well, on the ground that the items aggregating this amount were improper charges. These payments were made by Helis without prejudice to the suit which was then pending for the recovery of the alleged over-

payment, and without admission of liability either for the purchase price of \$400,000. then claimed or for the sum claimed to have been expended in the drilling of the Bernard No. 2 well.

By the acceptance of the checks sent by Helis in payment of the balance of the purchase price and
 84 in various communications cross-complainants herein recognized Helis as the owner of the leasehold estate and did not attack his title thereto until January 29, 1937, almost two years after the Bernard No. 3 well was brought in, when substituted and amended pleadings were filed herein claiming Helis was estopped to claim title as the result of the action taken by him in instituting the aforementioned attachment proceedings. Since the filing of this suit one of the complainants, Y. D. Spell, has accepted his proportion of the \$50,000. fund under seizure, and in doing so specifically released Helis from any and all liability with respect to the payment of the minimum purchase price due under said contract.

The contract of February 6, 1935, was between parties engaged in the same line of business, was prepared jointly by the contracting parties and their respective counsel and was executed in the office of counsel for the sellers. Under the circumstances it would seem reasonable to assume that the parties contracted with knowledge of those general conditions which are known throughout the oil industry.

The capacity of an oil well in the Louisiana gulf coastal region is the actual production thereof measured either on a particular choke or on an open flow. Complainants' own expert concedes that it is impracticable, if not impossible, to produce a well located on a salt dome structure such as this was on an open flow, because to do so would kill the well within a very short period. The phrase, "according to the usual methods employed in gauging the capacity of oil wells" simply means that the well is flowed through a particular choke for a period of one or two hours and the amount of oil actually pro-

duced into the gauge tank is multiplied by the figure necessary to determine the twenty-four hour production. This is the capacity of the well on the particular choke used. The testimony in this case is all one way and to the effect that it is impossible to determine the capacity of an oil well in the Louisiana gulf coastal region on any

85 other choke simply by observing the well on a 3/8 inch choke. Indeed it is difficult to perceive

how complainants can derive any comfort from the testimony of their witness Buck, for he admitted that his estimate that the Bernard No. 3 well would produce more than 3,000 barrels of oil per day on a choke larger than a 5/8 inch choke was not the usual and customary method of determining the capacities of oil wells in the oil industry. Furthermore, he testified that the Bernard No. 3 well could not produce more than 3,000 barrels of oil per day through a 3/8 inch choke according to the usual methods employed in gauging the capacity of oil wells, and that it was impossible to determine the open flow capacity of a well by observing it on a 3/8 inch choke solely. He did testify that in his opinion it was not possible for the Bernard No. 3 well to produce as much as 3,000 barrels of oil per day on a 3/8 inch choke, but according to my recollection no testimony was offered with respect to the production of a lighter gravity oil from a deeper producing horizon. But be this as it may, I am of the firm belief that this opinion testimony has no legal significance. The contract is plain and unambiguous and if the parties unwittingly contracted for a premium or bonus on the happening of an impossible condition, the provision of the contract with respect thereto is of no legal consequence.

The record justifies but one conclusion and that is that the Bernard No. 3 well was incapable of producing as much as 3,000 barrels of oil per day calculated on a 3/8 inch choke according to the methods usually employed in gauging the capacity of oil wells. It follows that the proper purchase price was \$300,000., and that the action taken by Helis in the preservation of his rights under the agreement were entirely proper. The disputed items

of drilling costs have not been made an issue in this suit and I express no opinion with reference thereto.

Nor is there any merit in complainants' plea of equitable estoppel. To establish equitable estoppel or estoppel in pais, there must be a false representation or wrongful or misleading silence on the part of the party sought to be estopped. The error claimed must originate in a statement of fact and not an opinion or statement of law, and

86. the person claiming the benefits of estoppel must be ignorant of the true facts and adversely affected by the acts or statements of the person against whom an estoppel is claimed. There is no evidence in this record indicating that Helis misled the plaintiffs by false representations. To the contrary he openly and consistently maintained that the proper price was \$300,000., and he paid the larger amount initially demanded with full reservation of all of his rights under the contract and in order to avoid irreparable injury. The execution and delivery of the assignment was not induced by any misrepresentation on the part of defendant but was made by the plaintiffs pursuant to the obligations imposed upon them by the contract. Subsequent to the execution of the assignment the plaintiffs recognized Helis as the owner of the leasehold estate, and with full knowledge of his development of the property failed to assert any claim of ownership thereto until almost two years had elapsed from the date of his purchase of the lease. The claim that defendant is equitably estopped to assert title to the leasehold estate is without merit.

If it is not believed that this opinion is a sufficient compliance with Rule 70½ of the Equity Rules, findings of fact and conclusions of law may be submitted; otherwise, this opinion will stand as the findings of fact and conclusions of law in this case, and be deemed to constitute the formal decision thereof.

A decree of dismissal with costs may accordingly be entered.

(Sgd.) WAYNE G. BORAH,
U. S. District Judge.

New Orleans, Louisiana, September 3, 1937.

87

DECREE SIGNED SEPT. 27, 1937.

(Number and Title Omitted.)

This cause came on for hearing on February 26, 1937, on the substituted Bill of Complaint permitted to be filed herein by Order dated January 29, 1937, and was submitted to the Court for consideration upon the merits and on the testimony and evidence offered, and after argument, and the Court having considered the same pursuant to its opinion filed herein on September 3, 1937, the Court now adjudges and decrees that complainants, Y. D. Spell, A. B. Mhoon and Mrs. Itasca Kinfney Ward, Executrix of Bryan Ward, take nothing by their bill of complaint and same is hereby dismissed with prejudice, defendant, William Helis, to recover from complainants his costs herein expended.

(Signed) WAYNE G. BORAH,
Judge.

New Orleans, Louisiana, September 27, 1937.

NARRATIVE STATEMENT OF THE EVIDENCE.

88

Filed Dec. 23, 1937.

(Title Omitted.)

Be it remembered, that the following is a full, true and correct statement in narrative and condensed form of all of the evidence adduced and proceedings had upon the hearing of the above numbered and entitled matter be-

fore His Honor, Wayne G. Borah, United States District Judge, on the 26th day of February, 1937, et seq.

Appearances:

Wm. N. Bonner and W. D. Gordon (Wm. N. Bonner) and Messrs. Terriberry, Young, Rault & Carroll (Andrew R. Martinez) Solicitors for Cross-complainants.

Messrs. Cobb & Jones (Lloyd J. Cobb), Solicitors for Petitioner.

90 WILLIAM HELIS, Petitioner, was called as a witness on behalf of Cross-Complainants, and, having been first duly sworn, testified under cross examination as follows:

Cross Examination.

I am the William Helis mentioned in the contract with Bryan Ward et al. I still own the lease mentioned therein, am in possession thereof and operating it. I know Henry Bernard, the owner of the property and royalties under the lease. He checks the earnings from the wells and the operations. I do not know his signature. Henry Bernard did not ask me if it was agreeable to furnish Bryan Ward and others reports from the well from time to time; if he had asked me it would have been agreeable. I can't say what the total production from the lease is since the first of April, 1935, without looking into the records, and I don't know whether or not it is over 2,000,000 barrels. Mr. Hawkins can answer whether the records are here.

HENRY LLOYD HAWKINS was called as a witness on behalf of Cross-Complainants, and, having been first duly sworn, testified under cross examination as follows:

My name is Henry Lloyd Hawkins. I am Office Manager for William Helis. The office of Mr. Helis and the

Canal Oil Company is all in one. Mr. Helis is president of the Canal Oil Company. I do not know William J. Bernard, and I do not know his signature. It would be very hard for me to carry in my memory the amount of oil produced in gross from the Bernard Lease in Iberia Parish since the first of April, 1935, and I did not bring my records to Court. I should think, though I can't say positively, that it is over 2,000,000 barrels. There have been five wells drilled on that lease. No. 5 came in in the last month or so; No. 1 also already drilled; No. 2 dry hole; No. 3 large well, and No. 4 was drilled after No. 3.

Q. Four is a small well, is it?

91 Mr. Cobb:

We object to this line of testimony on the ground that it is incompetent, irrelevant and immaterial under the terms of the contract, the sole and only question before the Court being whether the Bernard No. 3 well could or could not make 3,000 barrels calculated in the manner set forth in the contract itself. We are perfectly willing to admit the property probably produced 2,000,000 barrels in five wells, and also say another well is in the process of drilling, but the question is simply taking up the time of the Court and is not pertinent to the real issue before the Court.

Mr. Bonner:

I want the production simply by months. It would be material to show monthly production. I understood Helis, or someone stated this gentleman knows all about it, and probably had the records here.

Q. Do you know whether they are in the Court room or not, the monthly reports?

A. I don't think so.

Mr. Cobb:

I might announce the records are not in my possession. I do not think they are material. If Counsel wants the

reports he has the perfect right to go to the company's office and examine the records, or if he had exercised his legal rights, he could have issued subpoena for them, which he did not do. The records of the company are open to him.

Mr. Bonner:

I just want to ask this witness if he will testify, or put himself in position to testify simply to this monthly production for about 23 months. He admitted over 2,000,000 barrels. Now I thought to divide it up into months.

The Court:

If the witness knows, I assume he can answer.

Mr. Bonner:

He doesn't have the data with him.

Q. Will you go and look at it and make your memorandum and bring it back here and give us that testimony?

92

A. If the Attorney wishes.

Mr. Cobb:

No, objection, none whatever.

E. O. BUCK was called as a witness on behalf of Cross-Complainants, and having been first duly sworn, testified on direct examination as follows (the testimony of this witness being given in full under the exception provided in Equity Rule 75(b) with regard to expert testimony):

Direct Examination.

By Mr. Bonner:

Q. Please state your name?

A. E. O. Buck.

Q. Mr. Buck, you live at Houston?

A. Yes, sir.

Q. Your business is what?

A. I am Consulting Petroleum Engineer.

Q. Your training and experience has amounted to what?

A. I am a graduate from the Texas A&M College, class 1926, with major in geology and minor in petroleum engineering. I went to work for the Gulf Production Company in June 1926 as gauger. I worked in Northern Mexico, Southwest Texas, West Texas, North central Texas until 1931 for the Gulf Company. In 1931 I was employed by the State of Texas as Chief Petroleum Engineer for the Texas Railroad Commission. I was with them 19 months. In April 1933 I took over the position as technical adviser for the development of the Conroe Oil field for a group of operators that were developing in that field. I held that position until 1935 on full time basis, and after 1935 on part time basis, and since that time I have been in the consulting business in Houston.

Q. Do you know Mr. Alexander Deussen?

A. Yes, sir.

Q. A recognized engineer, petroleum geologist?

A. Yes, sir.

93 Q. You were associated with him for a time?

A. Mr. Deussen was Vice-chairman of the group of operators that were drilling the Conroe field, and at that time I was technical adviser for the Operators Association under Mr. Duessen.

Q. About April 26, 1935, the latter part, state whether you went to the Bernard Lease at New Iberia, La., for any purpose?

A. I do not recall now whether it was April 25th, 26th, or 27th but it was sometime around there; I could check my notes and see, but I went to New Iberia, got in on the morning train and went to the hotel there and met Mr. Massie at the hotel. That morning at the hotel I met Mr. Spell, and one or two other gentlemen, Mr. Smith, and I do not recall—

Q. What was Mr. Smith?

A. Mr. Smith was representing, as I understand it, the Lincoln Oil Company—

Q. When you say the Lincoln Oil Company you mean the William Helis interests?

A. I was under the impression Mr. Helis was President of the Lincoln Oil Company, and the Lincoln Oil Company had the property down there I was to test.

Q. That was your understanding?

A. Yes.

Q. Anyway it was that Bernard lease?

A. Yes.

Q. That Spell, Ward and others had sold to somebody, whether Helis or—

A. I was told—

Q. You had gone there at my request, at the request of Bonner?

A. That is right.

Q. And without going into details, with the understanding you were to meet somebody representing the other side's interest in the lease, or contract for the lease, and see a well there, and make some tests, and so on?

A. That is right.

Q. You say you met Mr. Smith representing the other people?

A. Yes, and Mr. Brasher.

Q. Did you go on the well?

A. Yes, sir.

Q. Were some other people at the well representing the other side too?

A. Yes. There was a fireman, switcher and pumper out on the lease, and possibly one or two other men out there.

Q. Did Mr. Smith and Mr. Brasher talk to you; did they know what the proposition was, what you were to do there?

A. I went out to the lease with Mr. Massie, and as I recall Mr. Smith preceded us out. On the way to the

lease we met Mr. Brasher on the side of the road. Massie introduced me to Brasher, and I outlied to him what I wanted to do about testing the well. He told me to go to the lease and Mr. Smith would be there, and that is what I did.

Q. What did you find at the well?

A. When I got to the well I found that there were two wells flowing into one battery of tanks. Of course, it would have been impossible for me to test one well while the other was flowing into the same battery of tanks, because I did not know what either well was producing. We spent the first day rearranging the connection, getting No. 1 well produced over into an old wooden tank so we could separate the production.

Q. Right there; at that time on that lease there were two producing wells?

A. That is true.

Q. We will call them No. 1 and No. 3. The little well is No. 1 and the larger well you were to test No. 3?

A. Yes, sir.

Q. You cut out small well No. 1 into a separate tank, so that No. 3 was connected with the tank with which you worked. Now go ahead?

A. I went up to the No. 3 well and the well was producing through both tubings of the Christmas tree, and I asked Mr. Smith what size chokes he had in the tree, and he said—

Objection, Mr. Cobb:

I object to anything he said.

The Court:

I sustain the objection. Do not state what anyone told you, it is hearsay.

The Witness:

I beg your pardon.

A. (Witness continuing) Mr. Smith referred to is a representative of Mr. Helis there at the well. He
 95 was asked what size chokes he had in the tree—

Objection: Mr. Cobb:

There is no testimony before the Court Mr. Smith was a representative of Mr. Helis, and it is not a fact. We deny that.

The Court:

There is nothing before me to show that.

Judge Bonner:

I should have read these telegrams which I did not read, which stated that they would have a man there. They did not say who; they said their representative. They had some men there. Now this witness, Buck, says he met this man Smith, and was told he was the man, Smith said he was the man, and met him at the well and cooperated with him. I would know of no other way of proving that Smith was their representative. They had somebody there. If it was not Smith, who was it? Let them state.

The Court:

I do not know who it was.

Judge Bonner:

I submit we have shown here—of course, I did not read those telegrams which said "We will have a man there on that date to make this test." Now he tells you he found Mr. Smith and Mr. Brasher, and Mr. Brasher said Mr. Smith was at the well and would meet him and cooperate with him.

Mr. Cobb:

The witness made the test. Let him testify to what test he made. What somebody else told him is immaterial whether he was our representative or not.

Judge Bonner:

We are going to get to that, but we can only do one thing at a time.

The Court:

The mere fact they stated they would have a representative at the well is not indicative of the fact they did have one there, and there is nothing to show Smith was a representative of Helis.

Mr. Jones:

There was no objection made to the testimony that this man was there representing the opposite parties to this controversy, whom he did not know, but they
96 were the opposite parties to this controversy, and the instruments which you have not read, but were introduced here, show that the meeting was in pursuance of an agreement that these people would send a man there, and Judge Bonner was to send a representative there, and this was their representative. Now if Mr. Helis had been there himself, any statement Mr. Helis would have made about the size of the choke there on the well would be admissible.

The Court:

I take this view of the matter as a practical proposition. I will allow it to go in, but unless you connect it up with Smith showing that he was the representative—

By Judge Bonner:

Q. You were told the size of the chokes?

A. Yes, sir.

Q. By this fellow Smith?

A. Yes, sir.

Q. Did it look to be correct; maybe you can state the size of the choke by looking at it. Can you or not?

A. Oh yes.

Objection: Mr. Cobb:

I object. This man is testifying as an expert. Let him testify what the chokes were.

The Court:

I assume so.

By Judge Bonner:

Q. Can you tell with the eye or not?

A. You have to take these chokes out of the tree, so I told Mr. Smith, after he told me the size of the chokes, I told him what I wanted, and we closed the well in on one side of the Christmas tree and these chokes calibrated. I took that out and examined it, and it was what Mr. Smith said it was, so we produced the well through the other wing of the tree. I think it had 3/8th inch choke as Mr. Smith said. However, we examined that choke and it was as Mr. Smith said.

Q. All right?

A. So we tested the well on three chokes the first time it was tested,—

Objection: Mr. Cobb:

We object to any testimony by this witness with respect to three tests, on the ground that paragraph-3 of the contract of February 6th provides that the capacity of the well shall be calculated on a 3/8th inch choke according to the usual methods employed in gauging the capacity of oil wells, and that the capacity shall be based on average daily production for a period of 15 days after completion of the well, and that it is wholly immaterial to the issue involved herein, on any choke except 3/8th inch.

The Court:

I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke.

Mr. Cobb:

I just want to protect my rights.

The Court:

I sustained the objection.

By Judge Bonner:

Q. From your experience are you familiar with the usual methods employed in gauging the capacity of an oil well?

Objection: Mr. Cobb:

I object to that question because this witness has not been qualified as an expert with respect to production on the salt domes of Louisiana, and unless the witness is able to qualify himself as an expert with respect to salt domes here, which are produced under different conditions than those obtained in other fields, east Texas, and other fields, the testimony would be wholly incompetent.

The Court:

All right. Lay the foundation.

By Judge Bonner:

Q. Mr. Buck, in what fields in the Gulf Coast have you worked in, and had experience in, and been consulted in and studied?

A. Spindle Top salt dome field, Martin Salt Dome field, Conroe Salt Dome field, Barber's Hill Salt Dome field.

Q. Whatever difference there may be in salt or other things, is there any difference in the geophysical formation and structure on one side of the Sabine River and others along the Gulf Coast?

A. I do not know, Mr. Bonner. I would say in a well that the gravity of the oil and the pressure would be the controlling factor regardless of whether it was in the Panhandle of Texas or in Mexico.

Q. You were at this lease several days on that first trip?

98 A. The first trip I was down there two days.

Q. And then you were down there some 15 or 20 days later; we have the dates here; you were there then with Mr. Massey—

Objection: Mr. Cobb:

I object to Counsel leading the witness. Let him ask the question and the witness respond to it.

The Court:

I sustain the objection.

By Judge Bonner:

Q. Were you there twice?

A. Yes, sir.

Q. How long were you there each time?

A. Two days the first time and one day the second time.

Q. Who was with you the second time?

A. Mr. W. L. Massey, then employed by the Texas Railroad Commission, and Mr. Mitchell.

Q. Now have all the States for the last few years in some variation had prorated wells?

Objection: Mr. Cob:

I object to that question on the ground it is irrelevant and immaterial, unless the purpose of the question is shown. We are not trying proration here, whether the States of Texas, Arizona or Alaska have proration laws.

The Court:

As a matter of fact, there weren't any proration in Louisiana at that time.

Mr. Cobb:

No, sir.

The Court:

What is the purpose of the question?

Judge Bonner:

The purpose of the question is to show the well does not produce an open flow.

The Court:

Why don't you just ask that question.

Mr. Cobb:

I have no objection to that question.

Judge Bonner:

I was wrong, but just my way of getting to it.

Q. Do they flow the well wide open now to find out how much they are making or not?

A. There may be some instances where they do, but the general practice is not to.

Q. What is the accepted usual method of ascertaining the capacity of a well when it comes in in the Gulf Coast country?

A. Along the Gulf Coast in Texas most wells are gauged through a quarter inch choke; Southwest Texas usually $\frac{3}{8}$ th inch choke. Other parts of the State $\frac{1}{2}$ inch choke. Various factors control the amount of oil they permit them to flow under these various conditions.

Q. Do you know what the practice has been in Louisiana in the high country, what size is usually employed along there in testing wells?

Objection: Mr. Cobb:

I object unless limited to the period in which this test was made, that is 15 days after completion of the Bernard well.

Judge Bonner:

This contract was made in February 1935, and this contract provides for $\frac{3}{8}$ th inch choke.

The Court:

My idea about it is this. The Court does not think there is any ambiguity in the contract at all, and I do not see any necessity of evidence to try and explain the contract. I think it is quite clear anyone reading it can understand it.

Judge Bonner:

That is our impression of it, and we argued a motion to that effect and Your Honor overruled it. We really did not know what the Court did conclude about it, and we thought we should at least go as far as the Court wanted us to, offer some testimony here to show the way the parties understood the situation, their declarations at that time, and every practical construction of it, just as far as the Court wants us to go. If you think the matter is clear, as we think it is, we do not want to go over it.

Mr. Cobb:

I am perfectly willing to close the case at this time if Counsel is willing to do so and submit the issue on the contract itself.

Judge Bonner:

We are trying the case here now.

100 The Court:

The motion to dismiss involved some other questions except the question of interpretation of the contract, according to the Court's theory.

Judge Bonner:

I had wanted to ask one or two more questions at least, if the Court please. If the Court and Counsel do not object, I would like Mr. Gordon to take charge for a moment and ask a question he has in mind.

The Court:

Very well.

By Mr. Gordon:

Q. From your experience as an engineer—

Mr. Cobb:

I take it that Judge Gordon is representing Y. D. Spell in this proceeding?

Mr. Gordon:

In cooperation with the others.

Mr. Cobb:

We have no objection to Judge Gordon proceeding in the case, but at this time simply point out to the Court the argument we had at the last hearing.

The Court:

Very well.

By Mr. Gordon:

Q. From your experience as an engineer which you detailed from the stand, are you able to state whether or not you can calculate the capacity of the oil well that you examined, No. 3, in this record, based upon the 3/8th inch choke that your first test was made with?

Objection: Mr. Cobb:

I object to the question on the ground that it elicits, or attempts to elicit from the witness an answer which is irrelevant and immaterial to the issues involved, because the sole question before the Court is what the well actually produced calculated on a 3/8th inch choke for a period of 15 days after completion of the well.

The Court:

The Court makes this observation. There has been offered in evidence here without objection this witness' report together with a chart amplifying same, showing production of a well on 1/4th choke 3/8th inch choke, and 11/16th as I recall it—

The Witness:
Half inch.

The Court:
Half inch.

The Witness:
Calculated then to 5/8th inch.

The Court:
And showed the scale and production on each one, and I do not see how the question could add anything to that testimony.

Mr. Gordon:
I withdraw my question because I agree with Your Honor it is covered in their report attached to their Answer.

Mr. Bonner:
We have no further questions for the witness now.

Mr. Cobb:
I reserve the right to cross-examine the witness.

Mr. Bonner:
Oh yes.

The witness, HENRY LLOYD HAWKINS, recall, testified as follows:

Direct Examination.

I have here the monthly production from the Bernard Lease, which including April 29, 1935, to December 31, 1936, amounted to 1,802,565.32 barrels. The present price per barrel is \$1.04, and the lowest price during that time was about 90 cents. The first production, between

April 22 and April 29 was sold to Abercrombie Company for only 88 cents. No. 5 well came in completed January 15, 1937. No. 6 was completed February 12, 1937. No. 1 was there when we took possession of the lease, No. 2 was dry, and No. 3 was completed about April 21, 1935. No. 4 was completed September 5, 1935.

Cross-Complainants introduce in evidence Statement produced by witness showing monthly production of lease, which is identified as Exhibit 18.

The witness, E. O. BUCK, recalled, testified on cross examination as follows:

102 By Mr. Cobb:

Q. When was your experience in Spindle Top?

A. I went to work there in 1919. I was still in High School and I was back there in 1925, and I worked there in the summer while going to college. I went back since then when Mr. Hammond was interested in the lease on the south flank of the dome. I made that investigation in 1936.

Q. How old are you?

A. 31.

Q. When did you get your experience in Markham?

A. Still getting that. I represented Mr. J. G. Brill and Mr. Hammond.

Q. When did you get your experience at Barber's Hill?

A. When I went there on two occasions in 1931 and 1932 while I was with the Texas Railroad Commission.

Q. You consider yourself a petroleum engineer?

A. Yes, sir.

Q. Are you familiar with production methods?

A. Yes, sir.

Q. Would you consider yourself a qualified production engineer?

A. I think so.

Q. How did you test the capacity of the Bernard No. 3 well on a 3/8th inch choke?

A. By placing a 3/8th inch choke in the tubing wing of the tree, closing the well off on the other wing of the tree, getting a back gauge on a battery of tanks, and getting a front gauge on a battery of tanks over a period of time, to see how much oil the well produced over a period of time.

Q. How did you get the actual production through a 3/8th inch choke?

A. By placing the 3/8th inch choke in the tubing wing of the tree, and closing off all other openings.

Q. How did you measure the quantity of oil produced?

A. By taking strappings of the well being produced, measuring the amount of oil in that tank, and measuring it hourly after that and using the tank table, computing that tank into barrel oil, and measure what the well was producing.

Q. Did you calculate the daily production on a 3/8th inch choke?

A. The daily production was calculated by taking the first one hour flow and multiplying that by 24; the second two hours' flow and multiplying that by twelve.

Q. Isn't that the usual and customary method employed in the oil industry in getting the capacity of an oil well with a 3/8th inch choke?

A. The capacity of the well —

Q. Answer my question?

A. That is what I am trying to do.

The Court:

Answer yes or no and then explain it.

By Mr. Cobb:

Q. Read the question? (Question read).

A. No, that is not.

The Court:

Now you can explain it.

A. (Witness continuing) In gauging the capacity of a well on a 3/8th inch choke, the common practice would be a four hour flow, preferably 12 hours flow, and still another, taking the actual amount the oil well produced every 24 hours. There would be no calculation there at all, you have actual physical record of the number of barrels produced.

Q. If you were unable to produce it any more than an hour, you would multiply the production by 24?

A. Yes, sir.

Q. In order to obtain the daily production?

A. Yes, sir.

Q. Through a 3/8th inch choke?

A. Yes, sir.

Q. If you produced a well through a 3/8th inch choke four hours, you would multiply that production by six to obtain the daily production on a 3/8th inch choke?

A. Yes, sir.

Q. How would you calculate the production on a 3/8th inch coke if you produced the well for 12 hours?

A. It would be two. The 12 hours flow would
104 give you your 24.

Q. How many times did you test the well?

A. On what size choke?

Q. On any choke.

A. I had the well under convenient testing for about two days and a half under various size chokes.

Q. What was the daily production calculated on a 3/8th inch choke?

A. (Witness referring to document) On a 3/8th inch choke on April 27th, the well was producing at a rate of 51.79 barrels per hour.

Q. How many barrels per day is that? You make the calculation please?

A. Approximately 123-1/2 barrels.

Q. You are wrong about that. You mean 1200?

A. Oh yes, 1233 barrels; pardon.

Q. According to your calculation, the daily production of the Bernard No. 3 well, on a $3/8$ th inch choke, in accordance with the usual method in gauging the capacity of oil wells was this figure you have just mentioned?

A. That is what the well was producing that day through a $3/8$ th inch choke, producing at that rate.

Q. Do the figures shown in your report represent the average daily production for 15 days after completion, calculated on a $3/8$ th inch choke?

A. No, sir.

Q. Now Mr. Buck, what is the capacity of an oil well?

A. The capacity of an oil well would be that amount of oil that the well would produce over whatever period of time that you would designate.

Q. Isn't it a fact that the capacity of an oil well is the amount of oil that it will produce, either through a choke, or no choke at all over a given period, with proper gas oil ratio?

A. I fail to see the connection of the gas oil ratio. The capacity of the well would be just what the well would produce.

Q. The capacity of an oil well on a quarter inch choke would be what it will produce on a quarter inch choke?

A. That is correct.

105 Q. And the capacity of an oil well on a $3/16$ th inch choke is what it will produce on a $3/16$ th inch choke?

A. That is correct.

Q. And the capacity of an oil well on a half inch choke is what it will produce on a half inch choke?

A. That is correct.

Q. And the capacity of an oil well on a $5/8$ th inch choke is what it will produce on a $5/8$ th inch choke?

A. That is correct.

Q. And the capacity of an oil well with no choke at all is what it will produce on an open flow?

A. That is true.

A. And in order to calculate what the well produces through one of those chokes, or without a choke, you determine the amount of oil produced during some given period, two hours, or four hours, or twelve hours, and then multiply that by the respective number of hours to determine the daily production for that well. Is that right?

A. You are now determining one particular choke or open choke, or one particular rate of flow?

Q. Whether the well is producing on a quarter inch choke, or half inch choke, to determine the daily production for that well through a given choke, you multiply the number of barrels produced during a period say of two hours, you multiply that by 12 to obtain the daily production on that choke?

A. That is true.

Q. And in order to obtain the production on that choke, that is the calculation that you make and the manner of calculating?

A. That is correct.

Re-Direct Examination.

By Mr. Gordon:

Q. How much is it possible for a well to flow through a $3/8$ th inch choke, if it is choked down that small, without regard to the capacity of the well if it had no choke on it?

106 Objection: Mr. Cobb:

I object your Honor. The sole question before the Court under the contract is how much the well produced during the period of 15 days after completion, calculated on the $3/8$ th inch choke according to the usual method employed in gauging the capacity of the oil well.

The Court:

I sustain the objection.

Mr. Gordon:

We reserve a bill of exception.

The Court:

I will state in connection with the ruling Counsel on both sides will concede there is no ambiguity in the contract.

Mr. Cobb:

We concede that.

By Mr. Gordon:

Q. What do you mean by calculating the capacity of the well upon a certain choke?

Objection: Mr. Cobb:

I think we have already gone over that ground very carefully. I object.

The Court:

I think the witness has already explained it.

Mr. Gordon:

I would like the answer in for the purpose of my bill.

The Court:

All right. Answer the question.

A. A Calculation of production would be that amount of oil from the well produced on a certain choke over a given period of time, calculated to represent a 24 hour period.

Q. What would be the total capacity of that well on an open flow without any choke at all calculated on a 3/8th inch choke?

Objection: Mr. Cobb:

I object to that question because the witness has already testified what the production of a well calculated on a 3/8th inch choke was.

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The Court:

Q. Can you answer the question?

A. It would be impossible to calculate the flow of that well on a 3/8th inch choke.

107 By Mr. Gordon:

Q. Would that well be more or less than 3,000 barrels calculated on a basis of a 3/8th inch choke, if there were no choke on the well?

Objection: Mr. Cobb:

That is the same question in another form.

The Court:

I assume so. Answer the question.

A. The well would produce while I was there in excess of 3,000 barrels a day, but you have to get a choke larger than 3/8th inch to do it. It is impossible for oil with that pressure and that type to flow 3,000 barrels with a 3/8th inch choke. It is physically impossible.

Objection: Mr. Cobb:

We move to strike the answer of this witness on the ground it is unresponsive, and immaterial to the contract between the parties.

The Court:

Overruled. It is not being tried before a jury.

Re-Cross Examination.

By Mr. Cobb:

Q. Is it possible to flow a well in the Gulf Coast region on an open flow?

A. Oh, yes, it is possible.

Q. How long would the well last?

A. Each well would be an individual problem, anywhere from five minutes to five years.

Q. Do you know of any well that flowed in the Coastal region on an open flow?

A. Yes.

Q. What well?

A. Texas Company, neighborhood of Columbia—I forget now—it came in in 1921 and still producing today, producing over 3,500,000 barrels, and still producing. The well has never been choked except as it flowed through the pipe.

Q. When did chokes first come into use in the oil industry?

A. The first recollection that I have of a choke—

Q. Answer my question please, Mr. Buck. When did chokes first come into use in the oil industry?

A. The first recollection I have was in 1928.

108 Q. The oil industry did not know anything about chokes before that time?

A. Define the choke for me so I can better understand you?

Q. You are a petroleum engineer. Can't you define what a choke is?

A. A choke in broad terms would be reducing the orifice through which the well was producing, so long as we had a valve of any sort—and we could not complete a flowing well without a valve on it—Columbia had a choke on their well in 1921, but the choke we speak of today is a positive choke six inches long, bored out smooth, bored to a certain given calculated orifice. Prior to the use of this choke as we now call it, we had a flow bean that was used to reduce the flow of the well, and installed the flow bean in wells on the Gulf Coast.

Q. Isn't it a common practice of all companies to produce wells in the Coastal region on a choke?

A. Yes, sir.

By Mr. Bonner:

Q. That is true, is it or not, everywhere, not only the Gulf Coast, but wherever there are large wells that flow?

A. So far as I know it is a common practice.

Q. Did Mr. Helis, or his representative Smith, or Brasher, or anybody else —

Objection: Mr. Cobb:
I object to the question.

The Court:

I sustain the objection as to the form of the question. It is denied that Mr. Smith was a representative of Helis.

By Judge Bonner:

Q. Did Mr. Helis, or anyone speaking for him, or purporting to speak for him on that lease, ever ask you to do anything in the way of testing and so on that you did not co-operate in doing, and did they ever ask you to come another time, or make any request for cooperation that you did not comply with?

A. No. Nothing occurred on the lease in any way during the three different days that I was there. Mr. Brasher, the first day I met him on the road did not go to the lease. He told Mr. Massie and me that Mr. Smith would be there, and Mr. Smith was at the lease
109 when we got there, and I told him what I wanted to do in the way of testing the well, and he told me to go ahead, but that I could not produce the well on a rate of flow in excess of 3/8th inch choke, and the first day I tested the well was on a flow of 3/8th inch, not larger than 3/8th inch.

Q. Whether he represented Mr. Helis or not, did those men in charge of the lease do what he told them to do, cut this particular well in separate tanks?

A. Yes, sir.

Q. On his request?

A. Yes.

Q. This fellow Smith?

A. Yes, sir.

Q. By the way; I think I asked you this question. When you went back there the first time, did the pressures on the well have a great deal to do with its potential capacity to produce?

A. Yes, sir.

Q. Were the pressures as good at the last as they were in the beginning?

A. The conditions at the well on the 5th day of May were identical, as I could determine from the surface of the ground, as they were on the 27th of April when I was there previously.

Q. Taking the well as a whole, what does it make through the various small chokes that you placed it on, as you reported. Is that as big as any oil well you have seen along the Gulf Coast?

Objection: Mr. Cobb:

I object.

By Judge Bonner:

Q. Have you seen any larger oil wells than that along the Gulf Coast?

Objection: Mr. Cobb;

I object.

By Judge Bonner:

Q. Is that the biggest oil well along the Gulf Coast in your opinion?

The Court:

I cannot see that it makes any difference what he has seen. It is what this well did on a $3/8$ th inch choke.

Judge Bonner:

I thought if this is as big as a well on the Gulf Coast he can state it.

110 The Court:

The capacity is to be calculated on a $3/8$ th inch choke.

Judge Bonner:

Yes. I think the witness ought to be permitted to testify that this is as big as any oil well which he has seen on the Gulf Coast. I think it is competent.

The Court:

Let us see if he can make that statement.

By Judge Bonner:

Q. Have you seen an oil well bigger than this one in Louisiana or Texas in recent years, and if so, where is it?

Mr. Cobb:

I would be glad to show Counsel several bigger than this one, if he is interested in seeing them.

A. (Witness referring to book) This well flowed at a rate of 25.22 barrels an hour through a quarter inch choke. That does not mean anything so far as the size or the capacity of the well is concerned, but I have in the past two months gauged a well through a quarter inch choke that made 31 barrels in one hour.

Q. In other words, a little larger than this one?

A. Yes, sir.

Q. Where was that well?

Objection: Mr. Cobb:

I object.

The Court:

I do not see any use in showing that.

By Judge Bonner:

Q. This was a very large oil well for the Gulf Coast?

A. Yes, sir.

Adjourned until 2:00 P. M.

2:00 P. M. After recess:

MR. E. O. BUCK: Recalled.

By Judge Bonner:

Q. Mr. Buck, I am not sure this morning that you testified on this point; I want to be sure. In
111 your status and observation and experience, have you ever heard of one well in your life, or seen one, that would produce 3,000 barrels a day through a 3/8th inch choke?

Objection: Mr. Cobb:

I object to the question on the ground that the contract is the law between the parties, and that what this witness may have seen, or what he did not see in the oil industry is incompetent, irrelevant and immaterial, because the issue here is the capacity of the Bernard No. 3 well as fixed by the contract.

The Court:

I will permit the witness to answer the question.

A. No, I have never seen a well that would produce 3,000 barrels a day through a 3/8th inch positive choke.

Q. Have you ever read of one or known of one?

A. No, sir.

Q. Now just to gauge a well, just the process of gauging an oil well flowing into a tank, just to tell how much it is making a day, or hour, or week, is that a complicated or simple thing?

Objection: Mr. Cobb:

I object to that question. The witness has already testified as to the method of calculating the production of a well through any given choke. It is pure repetition.

Judge Bonner:

Counsel misunderstood my question I am afraid.

The Court:

He stated how it was done. He said at first he would get the measurement from the gauge tank and through the tank table ascertain how much oil there was in there and test that over a period of time and see how much oil there was in the lease or gauge tank.

By Judge Bonner:

Q. Is that an engineering problem, or can any school boy do it. Is it a complicated thing?

Objection: Mr. Cobb:

I object to the question on the ground it calls for the opinion of the witness.

112 By Judge Bonner:

Q. Let me make the question a little more full. Let us assume that the tank on this lease was strapped to begin with; when a tank builder builds a tank he gives you the strapping for it?

A. That is correct.

Q. That is a table which shows you how many barrels of oil are represented by say a foot in the tank, or an inch, something of the kind?

A. Yes, sir.

Q. Let us suppose that this tank was strapped to capacity, that one inch of oil represented 60 barrels, that was your strapping table. Then what would be the process of determining the production that actually went into the tank, no matter what size choke. Would it merely be to take two inches and that be 120 barrels, and so on, just a matter of multiplication; it is a simple process?

A. Yes, it is a simple process.

Q. Did you ever know an instance in the past where engineers were called in just to gauge a tank?

Objection: Mr. Cobb:

I object to the question on the ground that it is incompetent, irrelevant and immaterial to the issue in-

involved. The sole question before the Court is whether this particular well had the capacity called for by the contract.

The Court:

I sustain the objection.

By Judge Bonner:

Q. In the ordinary oil field practice how often are tanks usually gauged over a month?

Objection: Mr. Cobb:

I object to the question on the ground we are not delving into the oil field practice. The sole question before the Court is how much this well produced according to the test provided by the contract.

The Court:

I sustain the objection.

Judge Bonner:

I wanted to ask one more question, and that is, who in the ordinary practice does the gauging, just a \$200.00 a month man, or is it an engineering problem.

113 The Court:

Who did it in this instance might have some bearing. We are trying this case, not what the practice was somewhere else.

Judge Bonner:

The Court does not quite understand my point. To make it perfectly clear, if I understand the Court, we are all together on it, that this complicated thing, they furnishing a man and we furnishing a man, and an umpire, no such process as that was ever contemplated to gauge a tank. If the Court is in agreement on that I

will abandon it, but I want to make it clear on the evidence that just gauging a tank, any 18 year old boy can do.

The Court:

I concede that is a question of argument, but I think the facts are fully developed. You have all the latitude you want to bring out the facts bearing on this particular evidence.

Mr. Bonner:

I think the matter is sufficiently in the record. That is all, Your Honor.

A. B. MHOON, one of the Cross-Complainants, called in their behalf, and being first duly sworn, testified as follows:

Direct Examination.

My name is A. B. Mhoon. Shortly after this suit was filed, there was transmitted to Houston \$150,000.00, which was received by plaintiffs in their proper portions, Mitchell 1/3, Spell 1/3, myself 1/6 and Ward 1/6. No other sums have been paid to us other than some monthly oil payments. The total amount of the oil payments to all of us combined was \$100,000.00 less \$3111.09, which was received by us in our proper proportions. In addition to this Y. D. Spell received \$16,333.00, one-third of \$50,000.00 last summer but Ward, Mhoon and Mitchell have not received any additional sum.

Cross Examination.

I know the signature of Mr. Bryan Ward, one of the plaintiffs in this suit. This letter dated June 17, 1935, addressed to the Chalmette Refining Company and

signed A. L. Mitchell, A. B. Mhoon and Bryan Ward, by Bryan Ward, bears the signature of Bryan Ward.

The item of about \$3,000.00 is a disputed item of drilling costs which were paid by the defendant Helis under protest and with full reservation of his rights. It was deducted from the \$100,000.00 we were to receive out of oil and is still in dispute. In other words, we were paid \$100,000.00 less the disputed amount of \$3000.00. I believe the disputed items include an item in favor of A. L. Mitchell, one of the complainants, for \$875.00, representing rental on the rig used in the drilling of the dry hole. It also includes an item representing or alleged to represent the charge for returning the boilers and sundry other equipment to Houston.

Q. Does this disputed item also cover—

Mr. Bonner:

If the Court please, there is no issue in the pleadings about these matters. I do not know the purpose of them. I want to formally object.

The Court:

I think the pleadings do cover it.

Mr. Cobb:

Certainly they do.

Mr. Bonner:

I do not know of any, I haven't seen any.

The Court:

I think it is proper.

The disputed item also includes a charge in favor of Mr. Ward and myself for derrick rental. I received a letter which reads similar to this copy dated June 22, 1935, addressed to me and signed William Helis by (Blank) Office Manager.

Stipulation:

It is stipulated that the copies of letters dated June 22, 1935, addressed to A. L. Mitchell, Mr. Bryan Ward, Mr. A. B. Mhoon, and Mr. Y. D. Spell, are copies of the original letters received by each of the persons named.

115 I saw but did not prepare myself the drafts which were drawn by the Union National Bank for the original cash portion of the purchase price. These two customers' drafts, dated May 11, 1935, one for \$215,530.34, and the other for \$1918.90, directed to William Helis, through National Bank of Commerce, New Orleans, the first drawn by the Union National Bank, Houston, Texas, and the second for \$1918.90, drawn by Y. D. Spell, A. B. Mhoon, A. L. Mitchell and Bryan Ward, which appear to have been paid, are the drafts which had the documents attached and sent to the National Bank of Commerce in New Orleans. Mr. Mitchell, Mr. Ward, Mr. Spell and I received \$200,000.00 of the proceeds from these drafts, plus \$15,530.34, representing the cost of our dry hole, plus \$1918.90, which represents the purchase of some fuel, less \$50,000.00 which was seized in the attachment suit.

Re-Direct Examination:

Mr. Bryan Ward has been seriously sick for five months and at the present time is at the point of death. No one can communicate with him.

Petitioner offered in evidence the following Exhibits:

D-1. Letter of June 17, 1935, to Chalmette Refining Co.

D-2. Draft.

D-3. Draft.

D-4. Letter of June 22, 1935, to Mr. Bryan Ward.

D-5. Letter of June 22, 1935, to Mr. Y. D. Spell.

D-6. Letter of June 22, 1935, to Mr. A. B. Mhoon.

D-7. Letter of June 22, 1935, to Mr. A. L. Mitchell.

LLOYD J. COBB, a witness called by the Cross-Complainants, being duly sworn, testified as follows:

Direct Examination.

My name is Lloyd J. Cobb. The contract between my client, Mr. Helis, and the cross-plaintiffs was made in Houston in February, 1935. I was there with Mr. Helis and in conference with Mr. Mhoon and Mitchell and Ward pretty well throughout the day it was
116 signed. All parties were present at the conference with the exception of yourself, and I think that when they reached an agreement, I dictated in the office of Continental Supply Company to a stenographer, who was provided, a rough draft of the agreement which was subsequently presented to you, and which was re-written in your office where the deal was completed. We came to your office in the evening around 7:00 or 8:00 and had been in conference with you before.

Q. When you came to my office in the evening around seven or eight o'clock, you had a contract which on its face was a completed contract and handed it to me? Rough draft you called it?

Mr. Cobb:

I am in the position of being a witness and Counsel, too, and consequently I am going to object to this line of testimony on the ground that all the negotiations of the parties were merged in the contract; that the contract

is the law between the parties, and that it has been stipulated by Counsel on both sides in this litigation that the contract is plain and unambiguous, and if this be an attempt to alter, vary or change the terms of the contract, then the testimony is wholly incompetent, irrelevant and immaterial.

The Court:

I ask Counsel what is the purpose of the question.

Mr. Bonner:

I was going to get to it in this question.

The Court:

I sustain the objection. I asked you the purpose of it.

Mr. Bonner:

I was going to develop what he called a rough draft, that I made some pen and ink interlineation changes in; then the whole thing was rewritten.

I do not have the original contract which I wrote with the interlineations you made on it. If I ever had it, it was left in your office that night. I have never seen it since the night the contract was prepared. I do not have a copy of the contract that I wrote. It was a rough draft and of no importance to me after the contract was signed by the parties.

Mr. Bonner:

I want to ask you if it is not a fact that the only changes that I made in the contract—you know I did not dictate anything to a stenographer. I took pen and ink and made some interlineations. Do you remember that?

Mr. Cobb:

If you want to testify to what you did, I will concede you are privileged to do so, but my recollection is that

after the rough draft was submitted to you, a good many points were discussed at quite some length. The deal was not completed until about midnight, as I recall it, completed in your office, contract finally written up by your secretary, and as I recall it, you questioned a good many provisions of the original draft and made a good many changes.

The Court:

What is the purpose of the question? I assume all negotiations leading up to the contract and made in the contract were settled.

Mr. Bonner:

I was going to ask Counsel right here. I expected to find that Counsel had what he called a rough draft with my changes written on it, and it would show for itself what he wrote and what I wrote.

The Court:

The contract before the Court is the only contract the Court is interested in.

Mr. Bonner:

The circumstances surrounding the making, and particular interlineations one party makes in another's contract is of particular importance. There are a number of authorities—

Mr. Cobb:

There is a stipulation—

118 Mr. Bonner:

I do not recall any stipulation that I made at all about that.

Mr. Cobb:

This is the first intimation I have had that Counsel for the complainants were attempting to offer parole testi-

mony to alter, vary or change the terms of the contract, which it was agreed during the morning session was plain and unambiguous.

Mr. Bonner:

I want to ask you this, Mr. Cobb. You notice from the contract that it bears numbered paragraphs, figures, 1, 2, 3, and then 4 and 5, and so on, but between 3 and 4 there are two little sub-paragraphs, "A" and "B", wherein the words in "A" reads: "3,000 barrels each calculated on a 3/8th inch choke according to the methods usually employed in gauging the capacity of oil wells," and in "B" the words: "Well should be brought in capable of producing more than 3,000 barrels." Isn't it a fact that the paragraphs of the contract, the first part of it, 1, 2, 3, 4, 5, 6, and 7 being all of it, except sub-paragraphs "A" and "B" appearing between paragraphs 3 and 4, isn't all that contract your rough draft and aren't those sub-paragraphs "A" and "B", or practically all of them, a good portion of them, my interlineations over what you had there with reference to the way the well should be?

Mr. Cobb:

I object, to the question on the grounds heretofore stated, and on the further ground that Counsel and his clients changed their position like a chameleon throughout the negotiations, and only Almighty God knows what the parties were attempting to do except what they stated in the contract, which was the final agreement of the parties.

The Court:

I sustain the objection.

Mr. Bonner:

We want to except, if the Court please. We want the testimony to show that Counsel did write it all except paragraphs "a" and "b".

The Court:

I do not think Counsel can testify to that. If you want to take the witness stand and testify to that, it is all right, but I do not think you have the right to volunteer the statement. I order it stricken on my own accord.

Mr. Bonner:

All right, Judge. We except.

It is not true that this little supplement bearing the same date which mentions that Mr. Hardin, of the firm of Pujo, Bell & Hardin, would act as umpire, was dictated entirely by me to your secretary; you and I both were in your secretary's room, and that was a joint effort. As I recall, I dictated it to your secretary and you made changes. As I understand it, it was in your secretary's office, and you made some suggestion that you would like to have an agreement of that sort, and you said to me: "You dictate it," and I stayed there and dictated it, and you were there too, and as it was dictated you made certain changes. I do not recall now what they were, but it was satisfactory to you, and satisfactory to me at that time. Neither one of us placed any importance on it. The contract speaks for itself as to any provision for testing the well in some manner by engineers in case of dispute. I do not know who finally dictated the contract to the secretary. You and I sat in your office and worked out the final contract. It wasn't any more my contract than yours.

Mr. Bonner:

We offer no more evidence.

Petitioner introduces in evidence the following Exhibits:

D-8. Copy of telegram to Wm. Bonner, dated May 11, 1935.

D-9. Original telegram dated May 14, 1935, from Wm. Bonner to Wm. Helis.

D-10. Original telegram from Wm. Bonner to Lloyd Cobb, dated May 11th.

D-11. Original telegram from A. M. Alverson, Secretary of Judge Bonner, to Cobb & Jones, dated May 15th.

D-12. Original letter from W. D. Gordon, Attorney for Y. D. Spell, dated December 16th, to Canal Oil Co.

120 D-13. Copy of letter from Cobb & Jones to W. D. Gordon, dated December 23, 1935.

D-14. Duplicate original of letter dated May 28, 1935, from Wm. Bonner to Weeks & Weeks, Attorneys, New Iberia, La.

D-15. Copy of letter dated April 25, 1935, to Wm. N. Bonner.

D-16. Copy of telegram dated April 25, 1935, to Wm. Bonner.

D-17. Copy of telegram dated April 25, 1935, to Iberia Oil Corp.

D-18. Copy of telegram dated April 25, 1935, to Y. D. Spell.

D-19. Copy of letter dated April 26, 1935, to Wm. N. Bonner.

D-20. Original telegram dated April 26th from Wm. N. Bonner to Cobb & Jones.

D-21. Copy of telegram dated April 26, 1935, to Wm. N. Bonner.

D-22. Copy of telegram dated May 1, 1935, to Judge C. E. Hardin.

D-23. Copy of letter dated May 1, 1935, to Judge Bonner.

D-24. Copy of letter dated May 1, 1935, to Judge C. E. Hardin.

D-25. Duplicate original of letter dated May 3, 1935, from C. E. Hardin to W. L. Massey.

D-26. Duplicate original of letter dated May 3, 1935, from C. E. Hardin to Judge Wm. N. Bonner.

D-27. Copy of letter dated May 5, 1935, to Judge C. E. Hardin from Cobb & Jones.

D-28. Original telegram dated May 6, 1935, from C. E. Hardin to Lloyd Cobb.

D-29. Copy of letter dated May 6 to Judge C. E. Hardin from Lloyd Cobb, marked D-29.

D-30. Original letter from William Bonner to Lloyd Cobb, dated May 6, 1935.

D-31. Original letter from Wm. Bonner to Lloyd Cobb, dated May 6, 1935.

D-32. Original letter from C. E. Hardin to Lloyd Cobb, dated May 6, 1935.

D-33. Copy of telegram from C. E. Hardin to Lloyd Cobb, dated May 6th.

D-34. Copy of letter dated May 7, 1935, from William Helis to Iberia Oil Co. and Y. D. Spell.

D-35. Copy of letter dated May 8, 1935, to Wm. Bonner from Lloyd Cobb.

D-36. Copy of letter dated May 8, 1935, from Lloyd Cobb to Wm. Bonner.

Mr. Gordon:

I did not care to interrupt Counsel in offering these letters. I notice some correspondence between Counsel, offering the copies or originals, and a man named Hardin.

121 These documents are objected to on the part of the plaintiffs on the ground that they are hearsay, and they are incompetent as evidence in this case, and I ask the Court to disregard these copies of the correspondence, or the originals, occurring between Mr. Hardin and Mr. Cobb, or any other person represented by Mr. Cobb.

Mr. Cobb:

Judge Bonner attempted to show the purpose of the rider attached to the contract of February 6th, which called for the appointment of a petroleum engineer to act as umpire, and a man by the name of Massey was appointed, and the witness Buck concurred in his report. Both those reports are now evidence in this case, because the whole record in this case has been offered by Counsel for the defendant, and I think it quite material and proper to show the official act. Judge Bonner prefaced his remarks this morning that practically this whole transaction was handled by him and me. Frankly, I would have preferred not to introduce this file. It is only in the absence of Judge Hardin and Mr. Massey that I did it. My duty to my client is above my personal desires in the matter, and I have no alternative as I said, therefore I offered them.

The Court:

In view of the circumstances surrounding the trial I will allow the evidence to go in, though I confess I

cannot see the relevancy of them. I will allow them to be offered in order to make up the record so the whole matter will be before the Court, and will reserve Counsel a bill.

Mr. Gordon:

Mr. Cobb, have you introduced any correspondence from Mr. Massie?

Mr. Cobb:

None from Mr. Massey.

Mr. Gordon:

That will be satisfactory, Your Honor.

Evidence closed.

It is stipulated by and between counsel for the parties hereto that the above and foregoing is a full, true and correct statement in narrative and condensed
122 form, prepared in accordance with the Equity Rules, of all of the evidence adduced and proceedings had on the trial of the above numbered and entitled cause, and that same shall constitute the statement of evidence on this appeal.

(Sgd.) COBB & SAUNDERS,

Attorneys for Petitioner, Wm. Helis.

(Sgd.) W. D. GORDON,

(Sgd.) WM. N. BONNER,

(Sgd.) TERRIBERRY, YOUNG, RAULT &
CARROLL,

Of Counsel.

The above and foregoing Statement of Evidence, having been examined by me and agreed to by counsel, is hereby approved and ordered filed as a part of the record on this appeal. The original exhibits mentioned in the

foregoing statement of the evidence are ordered sent up with the record to the Circuit Court of Appeals. This 23rd day of December, 1937.

(Sgd.) WAYNE G. BORAH,
United States District Judge.

**CROSS-PLAINTIFFS' EXHIBIT MARKED "2", BEING
ASSIGNMENT.**

123

Filed Feb. 26, 1937.

This Agreement made and entered into this 11th day of May, 1935, by and between Iberia Oil Corporation, formerly chartered under the laws of Louisiana (in dissolution) herein represented by A. L. Mitchell, Bryan Ward and A. B. Mhoon, who as organizers thereof have at all times owned all the stock thereof and have constituted the Board of Directors (the said A. L. Mitchell being president) in the following proportions, viz: A. L. Mitchell owning one-half ($1/2$) the stock thereof; Bryan Ward one-fourth ($1/4$) the stock thereof; and A. B. Mhoon one-fourth ($1/4$) the stock thereof; also joining herein as Assignor Y. D. Spell, of Beaumont, Texas, and A. L. Matchell, Bryan Ward and A. B. Mhoon, all of Harris County, Texas, individually, all hereinafter known as Assignors, and William Helis, of New Orleans, Louisiana, hereinafter known as Assignee,

Witnesseth:

For and in consideration of the sum of Four Hundred Thousand Dollars (\$400,000.00) one-half thereof (\$200,000.00) in cash and the remaining one-half thereof (\$200,000.00) to be paid from oil as hereinafter stated, the receipt of said Two Hundred Thousand Dollars (\$200,000.00) cash being hereby acknowledged, and full acquittance and discharge therefor granted, the Assignors do by these presents (subject to the reserved oil payment hereinafter stated) grant, bargain, sell, convey,

set over, transfer, deliver and assign to said William Helis, with full warranty of title, that certain mineral lease dated September 28, 1931, by Willy J. Bernard, et al., in favor of E. V. Richard, duly registered in Conveyance Office for the Parish of New Iberia, Louisiana, in Book 117, at folio 562, and acquired by the Assignors herein by mesne Conveyance, covering the following described property, to-wit:

A certain tract of land, containing sixty (60) acres more or less in superficial area, situated in the Little Bayou Oil Field, in the Parish of Iberia, State of Louisiana, which tract of land is bounded in front or on the South by a road or by land of C. C. Noble, et al., or assigns, in the rear or on the North by property of Havert S. Seely, et al., or assigns (formerly property of John E. Schwing), on the East by property of H. F. Reynaud or assigns, and on the West by property of Dr. George J. Sabatier or assigns.

124 This transfer and assignment shall include all the right, title and interest of the Assignor, Iberia Oil Corporation, in and to any property or equipment owned by it and located on the leased premises and used and useful in connection with the operation of said property, and shall also include all oil produced from all wells located on the leased premises from and after the date of the completion of the well known as "Bernard 2," on, to-wit, April 1, 1935.

Assignors herein reserve an oil payment in the sum of Two Hundred Thousand Dollars (\$200,000.00), or fifty per cent of the purchase price as determined under the provisions of that certain agreement dated February 6, 1935, between the same parties hereto; and said oil payment shall be paid by the Assignee, its transferees and assigns, to the Assignors, their transferees and assigns, in the proportion of one-third ($1/3$) to Y. D. Spell, one-third ($1/3$) to A. L. Mitchell, one-sixth ($1/6$) to

Bryan Ward and one-sixth (1/6) to A. B. Mhoon, out of one-fourth of the proceeds derived by Assignee from the sale of the seven-eighths working interest in and to the oil produced from the leasehold estate.

Executed at Houston, Texas, in triplicate originals, as of the day and date first above written.

IBERIA OIL CORPORATION,
By A. L. MITCHELL, President.
A. L. MITCHELL,
BRYAN WARD,
A. B. MHOON,
Y. D. SPELL.

Witnesses:

JAMES CLAYTON,
J. B. BOWLES.

The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the state and county aforesaid, personally appeared A. L. Mitchell, a person well known to me, Notary, and known to me to be the person who executed the above and
125 foregoing instrument and acknowledged that he executed the same for and on behalf of Iberia Oil Corporation, in dissolution, as President, by authority of its Board of Directors, and for the uses and purposes therein stated.

Given under my hand and seal of office, at Houston, in Harris County, Texas, this 11th day of May, 1935.

IRENE WRIGHT,
Notary Public, Harris County,
Texas.

My commission expires June 1, 1935.

The State of Texas,
County of Harris.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the State and county aforesaid, personally appeared Y. D. Spell, A. L. Mitchell, Bryan Ward and A. B. Mhoon, persons well known to me, Notary, and known to me to be the persons who executed the above and foregoing instrument, and acknowledged that they executed the same as their own free act and deed and for the uses and purposes therein stated.

Given under my hand and seal of office at Houston, in Harris County, Texas, this 11th day of May, 1935.

IRENE WRIGHT,

Notary Public, Harris County,
Texas.

My commission expires June 1, 1935.

126 Filed May 15th, 1935. Time 8:00 A. M.
Olive May Winters, Dty. Clk.

State of Louisiana,
Parish of Iberia.

I hereby certify that the above and foregoing is a true and correct copy of the original filed for record on May 15th, 1935, and duly recorded in Conveyance Book 124, at folio 587 under Entry No. 48572 of the records of Iberia Parish, La.

In Faith Whereof, witness my hand and seal of office on this 20th day of February, A. D. 1937.

(Sgd.)

EUGENE F. MESTAYER,

(Seal)

Deputy Clerk of Court, Iberia
Parish, La.

**CROSS-PLAINTIFFS' EXHIBIT MARKED "3", BEING
CERTIFICATE OF SECRETARY OF STATE AS
TO FILING OF CONSENT TO LIQUIDATE COR-
PORATION, ETC.**

127

Filed Feb. 26, 1937.

State of Louisiana.

I, the undersigned Secretary of State, of the State of Louisiana, do hereby certify that consent to dissolve the Iberia Oil Corporation, domiciled at Lake Charles, Louisiana, and the appointment of a liquidator, signed by the stockholders on the second day of May, 1935, acknowledged before a Notary Public on the said date, and recorded in the office of the Clerk of Court of the Parish of Calcasieu, with proof of publication of notice of dissolution, as required by Section 54 of Act 250 of 1928, as amended by Act 65 of 1932, has been filed in this office on this the sixth day of May, 1935, and recorded in book "Record of Charters" No. 150, folio

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 6th day of May, A. D. 1935.

(Sgd.)

E. A. CONWAY,

(Seal)

Secretary of State.

**EXHIBIT MARKED "CROSS PLAINTIFF 4," BEING
CERTIFICATE OF SECRETARY OF STATE AS
TO FILING OF CERTIFICATE SHOWING WIND-
ING UP OF AFFAIRS OF CORPORATION.**

128

Filed Feb. 26, 1937.

State of Louisiana.

I, the undersigned Assistant Secretary of State, of the State of Louisiana, do hereby certify that certificate of the liquidator and the two other stockholders of the

Iberia Oil Corporation, domiciled at Lake Charles, Louisiana showing that the affairs of the corporation have been completely wound up and dissolved, in compliance with Section 62 of Act 250 of 1928, as amended, acknowledged before a Notary Public on the third day of May, 1935, has been filed in this office on this the tenth day of May, 1935, recorded in book "Record of Charters" No. 150, folio ..., and the corporation stands dissolved.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 10th day of May, A. D. 1935.

(Sgd.)

R. H. FLOWER,

(Seal)

Assistant Secretary of State.

**EXHIBIT MARKED "CROSS PLAINTIFF 5," BEING
ACT OF TRANSFER OF INTEREST FROM IBERIA
OIL CORPORATION TO A. L. MITCHELL, ET AL.**

129

Filed Feb. 26, 1937.

State of Texas,
County of Harris.

Know all Men by these Presents:

That on the 2nd day of May, 1935, I, Bryan Ward, was appointed by unanimous consent of all shareholders Liquidator of Iberia Oil Corporation, a Louisiana corporation, domiciled in Lake Charles, Louisiana.

That pursuant to said appointment and by virtue of authority vested in me by law and in order to wind up and liquidate the affairs of said corporation, I, as Liquidator, for and in behalf thereof, for the consideration hereinafter set out, have sold, conveyed, transferred and delivered and do, by these presents, sell, convey, transfer and deliver, unto A. L. Mitchell, Bryan Ward and A. B. Mhoon, an undivided two-thirds (2/3) interest in

and to a certain oil, gas and mineral lease, dated September 28, 1931, granted by Willy J. Bernard, et al., in favor of E. V. Richard, recorded in Conveyance Book 117, page 562, of the Conveyance Records of Iberia Parish, Louisiana, and acquired by mesne conveyances covering the following described property, situated in the Parish of Iberia, Louisiana, to-wit:

A certain tract of land, containing sixty (60) acres, more or less, in superficial area, situated in the Little Bayou Oil Field, in the Parish of Iberia, State of Louisiana, which tract of land is bounded in front or on the South by a road or by land of C. O. Noble, et al., or assigns, in the rear or on the North by property of Havert S. Sealy, et al., or assigns (formerly property of John E. Schwing), on the East by property of H. F. Reynaud or assigns and on the West by property of Dr. George J. Sabatier or assigns.

The interest here conveyed to the respective parties is as follows:

- A. L. Mitchell, one-third ($1/3$);
- Bryan Ward, one-sixth ($1/6$);
- A. B. Mhoun, one-sixth ($1/6$).

The consideration of this sale is the interest of the grantees in the Iberia Oil Corporation, the stock in which has been surrendered and canceled on the dissolution of the corporation. The grantees hereby assume each and every contract and obligation undertaken by Iberia Oil Corporation, especially all obligations undertaken in a certain contract with amendments executed on the 6th day of February, 1935, with William Helis.

To Have and to Hold the property herein conveyed unto the purchasers, their heirs and assigns, forever.

Witness my hand at Houston, Texas, in the presence of the undersigned, competent, attesting witnesses, on this 3rd day of May, A. D. 1935,

(Sgd.) **BRYAN WARD,**

Liquidator, Iberia Oil Corporation,

(Sgd.) **BRYAN WARD,**

(Sgd.) **A. L. MITCHELL,**

(Sgd.) **A. B. MHOON,**

Grantees.

Attest:

(Sgd.) **FRED. K. SPURLOCK,**

(Sgd.) (Illegible.)

State of Texas,
County of Harris.

On this 3rd day of May, 1935, before me, the undersigned authority, personally appeared Bryan Ward and A. L. Mitchell, Bryan Ward and A. B. Mhoon, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Sgd.) **AILEEN ALVERSON,**

(Seal)

Notary Public.

**EXHIBIT MARKED "CROSS PLAINTIFF 5-a," BEING
CERTIFICATE OF PARISH RECORDER'S OFFICE
AS TO RECORDATION OF ACT OF TRANSFER
OF INTEREST.**

131

Filed (attached to said act).

State of Louisiana,
Parish of Iberia,
Office of Parish Recorder.

This certifies that there has been received for recordation an act of Transfer of Interest from Iberia Oil Corporation to A. L. Mitchell, et al., acknowledged before

Aileen Alverson, Notary Public, on the 3rd day of May, 1935, which was duly filed & registered in Conveyance Book 124 at Folio 571, under Entry No. 48556 of the records of the Parish of Iberia, State of Louisiana.

This 4th day of May, 1935.

(Sgd.)

(Seal)

OLIVE MAY WINTERS,

Deputy Clerk, Ex-Officio Recorder, Iberia Parish, La.

EXHIBIT MARKED "CROSS PLAINTIFF 6," BEING COPY OF LETTER DATED APRIL 24, 1935, FROM IBERIA OIL CORPORATION TO WM. HELIS,

132

• Filed Feb. 26, 1937.

April 24, 1935.

Mr. Wm. Helis,
Masonic Temple Building,
New Orleans, La.

Dear Sir:

Iberia Oil Corporation and Y. D. Spell have assumed from the time Well #3 on the Bernard Lease came into production that it was recognized by you, as well as by them, as a well which, in contemplation of the contract between you, would produce in excess of 3,000 barrels. Various men of experience in the industry, including engineers, who have observed the well and noticed the pressures and the actual production, have pronounced it as a well capable of producing much in excess of 3,000 barrels.

Clients advise me that they understand that you or some of your agents have by telephone expressed yourself as not entirely satisfied with the potential capacity of the well as being in excess of 3,000 barrels; and still we have not heard from you to the effect that you desire the well observed by a representative from each party,

as provided in the contract, and upon their failure to agree, to have an umpire selected by Judge Hardin, as provided in the contract.

I have today talked to experienced oil men, including one of the outstanding petroleum engineers of the South, and upon the information which I furnished as to the actual production of the well, through one-fourth inch choke and three-eighths inch choke, the pressures which the well registered under the different chokes, the depth of the well, etc., each and all have felt sure that the well was capable of producing much in excess of the 3,000 barrels.

I learned for the first time today that the well is now on production and of the fact that you are not satisfied that it is capable of producing within the terms of the contract in excess of 3,000 barrels. Therefore,

133 on behalf of clients I write to say that unless you are so satisfied, my clients are ready to appoint their representative to meet with your representative at any date that you shall designate to go over the matter and take charge of the well during the test period, and if and when they fail to agree to join you in a request to Judge Hardin to name an umpire.

I assure you that from the very beginning my clients have regarded the well as one which would produce in excess of 300,000 barrels, and therefore that the purchase price was automatically fixed at \$400,000.00. If you exercise your option, and are entirely certain of their position on this point. However, if you wish to have your representative meet with client's representative, as above stated, we await your advice.

Very truly yours,

IBERIA OIL CORPORATION,
Y. D. SPELL,

By, Attorney.

cc Mr. Wm. Helis,
Frederic Hotel,
New Iberia, La.

**EXHIBIT MARKED "CROSS-PLAINTIFF-7," BEING
LETTER DATED APRIL 25, 1935, FROM COBB &
JONES TO WILLIAM N. BONNER.**

134

Filed Feb. 26, 1937.

**Cobb & Jones,
Attorneys at Law,
Canal Bank Building,
New Orleans.**

**Lloyd J. Cobb,
Joseph M. Jones,
Herman M. Baginsky.**

April 25th, 1935.

**Mr. William N. Bonner,
Attorney at Law,
Sterling Building,
Houston, Texas.**

Dear Sir:

Mr. Helis has referred to us your letter of April 24th relative to the capacity of Bernard No. 3 Well, as determined under and by virtue of the provisions of the contract dated February 6, 1935, and with full reservation of all rights of Mr. Helis as therein set forth, you are advised that he has been and is ready and willing at all times to make the test of this well, as provided in the contract, and as stated to you in our telegram this day, reading as follows:

"Relative contract between Iberia Oil Corporation Y. D. Spell and William Helis and capacity Bernard Number Three Well as determined by contract dated February sixth nineteen thirty five you are advised that our client William Helis has been and is at all times ready and willing to gauge well in accordance with agreement at any time convenient to you and your clients' repre-

sentatives stop Wire immediately when you desire to make test."

Please let us know immediately when it will be convenient for you to make the test required.

Very truly yours,

COBB & JONES,

(Sgd.) By LLOYD J. COBB.

LJC:GK.

EXHIBIT MARKED "CROSS PLAINTIFF 7-a," BEING
WESTERN UNION TELEGRAM DATED APR. 25,
1935, FROM COBB & JONES TO WILLIAM N.
BONNER.

135

Filed Feb. 26, 1937.

1935 Apr. 25 PM 5 31

DS67 74 2 Extra (VM DS)—New Orleans La 25 442P.

William N. Bonner (Dlr. 1707 South Blvd. L 5585)—
Atty at Law Sterling Bldg. (Closed) Hou.

Relative contract between Iberia Oil Corporation Y. D. Spell and William Helis and capacity Bernard Number Three Well as determined by contract dated February sixth nineteen thirty five you are advised that our client William Helis has been and is at all times ready and willing to gauge well in accordance with agreement at any time convenient to you and your clients representatives stop Wire immediately when you desire to make test.

COBB & JONES,

Attorneys for William Helis.

**EXHIBIT MARKED "CROSS PLAINTIFF-8," BEING
COPY OF TELEGRAM DATED APRIL 26, 1935,
FROM WM. N. BONNER TO COBB & JONES,
ATTORNEYS.**

136

Filed Feb. 26, 1937.

April 26, 1935.

**Cobb & Jones Attorneys
Canal Bank Building
New Orleans La**

**E. O. Buck designated by clients will meet your repre-
sentatives Frederic Hotel New Iberia early tomorrow
regards.**

WM. N. BONNER,

**Straight Message—Paid
Chg. Wm. N. Bonner, Sterling Bldg.**

**EXHIBIT MARKED "CROSS PLAINTIFF-9," BEING
TELEGRAM DATED APR. 26, 1935, FROM COBB
& JONES TO WILLIAM N. BONNER.**

137

Filed Feb. 26, 1937.

1935 Apr. 26 PM 2 21

HS68 8 Ser—New Orleans La 26 209P

**William N. Bonner—
Attorney at Law Sterling Bldg.**

**Test tomorrow as stated your telegram today satis-
factory.**

COBB AND JONES.

**EXHIBIT MARKED "CROSS PLAINTIFF-10," BEING
LETTER DATED APR. 29, 1935, FROM E. O. BUCK
TO IBERIA OIL CORPORATION.**

138

Filed Feb. 26, 1937.

Houston, Texas, April 29, 1935.

Iberia Oil Corporation,
Mr. Y. D. Spell,
Houston, Texas.

Mr. Wm. Helis,
New Orleans, Louisiana.

Gentlemen:

Being advised on last Friday that I had been designated by the parties first above named to act as their representative in testing a well on the Bernard Lease in Iberia Parish, Louisiana, I proceeded to that point, and arriving there early Saturday I reported to Mr. Brashear, who I had been advised would be the representative of Mr. Helis. I met Mr. Brashear on the road between New Iberia and the lease, as Mr. Brashear was coming into New Iberia. I conferred with him and made known my purpose. He stated that he would not return to the lease but that Mr. Smith and other representatives of Mr. Helis would be present. I proceeded to the lease, located Mr. Smith, conferred with him, went to the well, and in his presence conducted at least two tests of one-hour each; after which Mr. Smith left, stating that he would not remain longer. Both Mr. Smith and Mr. Brashear took the positive position that they were not interested in determining what the well might make on various size chokes, but that under the contract it had to actually produce over 3,000 barrels through a 3/8-inch choke to affect the purchase price.

The field men in charge of the well, Messrs. Brown and Dobbs (also representatives of Mr. Helis, who drilled said No. 3 Bernard well) insisted that they had instructions from Mr. Smith and Mr. Brashear not to permit the well to be tested on a choke other than a 3/8-inch, although at my arrival there it was flowing through a 3/8-inch choke and a 1/4-inch choke. I did, however,

open the choke to 1/2-inch and under separate cover I am submitting a chart and figures showing

the results obtained by using different sized chokes in making the tests. These results show that I am entirely certain of the conclusion that the well will actually produce far in excess of 3,000 barrels per day on any choke through which it is permitted to flow as large as a 5/8-inch choke, and my conclusion is that by permitting the well to flow openly without restraint it would produce in excess of 6,000 barrels per day.

Since neither Mr. Smith nor Mr. Brashear or other representatives of Mr. Helis would co-operate in the matter, I regard their declination as tantamount to refusing to agree that the well would produce over 3,000 barrels by the method specified in the contract, and understanding that upon our failure to agree a third party (an umpire) was to be appointed, I certify these facts to you for your consideration and am ready to make with the umpire and the representative of Mr. Helis further tests at any time and join the umpire in certifying to the results thereof if this be desired.

Respectfully submitted,

(Sgd.)

E. O. BUCK.

**EXHIBIT MARKED "CROSS PLAINTIFF-41," BEING
LETTER DATED MAY 1, 1935, FROM COBB &
JONES TO JUDGE WILLIAM N. BONNER,**

140

Filed Feb. 26, 1937.

Cobb & Jones,
Attorneys at Law,
Canal Bank Building,
New Orleans.

Lloyd J. Cobb,
Joseph M. Jones,
Herman M. Baginsky.

May 1st, 1935.

Judge William N. Bonner,
Attorney at Law,
Sterling Building,
Houston, Texas.

Dear Judge Bonner:

Herewith I am sending you copy of a telegram which I have this day sent to Judge Hardin, which is self-explanatory.

Upon my return to New Orleans this morning I found that Mr. Helis is in Memphis attending the wedding of Mr. Harry Fotiades, Secretary of Lincoln Oil Company, Inc., and will probably not return until the end of the week. For this reason it is impossible for us to obtain and send to you a statement of the cost of the Bernard No. 3 Well which you requested yesterday. I understood from you yesterday that the cost to Iberia Oil Corporation and Y. D. Spell of drilling the Bernard No. 2 Well has been computed and that you are in a position to furnish us with an itemized statement which we request you to do by return mail so that an analysis of the statement may be made in connection with the consideration of the exercise of our rights under the contract.

Please also let us know the final attitude of your clients with respect to the suspension of the options until a fourth well has been drilled as permitted by the supplemental agreement dated April 1st, 1935.

Very truly yours,

(Sgd.)

LLOYD J. COBB.

LJC:P.

1 Encl.

EXHIBIT MARKED "11a," BEING COPY OF TELEGRAM DATED MAY 1, 1935, FROM LLOYD J. COBB TO JUDGE C. E. HARDIN, ATTACHED TO EXHIBIT MARKED "CROSS PLAINTIFF-11."

141 Western Union.

New Orleans Louisiana May 1st 1935

Judge C. E. Hardin

c/o Pujo Bell & Hardin

Attorneys at Law

Lake Charles Louisiana

During conference yesterday in Judge Bonner's office at Houston you advised me it was your intention to appoint immediately that is yesterday afternoon a petroleum engineer in connection with controversy concerning capacity Bernard number three well as fixed by contract and upon my advising you that I had no previous knowledge Judge Bonner had requested you to come to Houston as I understood my conference with him was for other purposes I was quite taken by surprise and accordingly requested you to withhold appointment until today which would give us sometime to suggest names with full reservation all our rights under contract stop This you consented to do requesting me to wire or telephone you today stop As we informed you yesterday our position is that admitted facts show appointment of engineer absolutely unnecessary and that capacity of well as determined by contract is less

than three thousand barrels per day stop I understood yesterday Judge Bonner had previously suggested to you two engineers named Gill and Bennett stop We have been unable to obtain names competent engineers in short time allotted stop With full reservation all our rights under contract and expressly denying necessity for appointment if you nevertheless intend to act we suggest that only an outstanding independent honest and competent engineer be selected who is also familiar with Louisiana practices and that selection of engineer unfamiliar with Louisiana practices be avoided stop If and when you selection is made please wire us promptly and advise us when test will be made as we desire to have representative present reserving however all our rights in the premises stop Best personal regards.

LLOYD J. COBB.

842 Canal Bank Bldg.
Straight Wire.

EXHIBIT MARKED "CROSS PLAINTIFF-12," BEING
LETTER DATED MAY 3, 1935, FROM C. E. HARDIN
TO JUDGE WILLIAM N. BONNER.

142

Filed Feb. 26, 1937

(Letterhead of Pujo, Bell & Hardin.)

May 3, 1935.

Judge William N. Bonner,
Stirling Building,
Houston, Texas.

Judge Lloyd J. Cobb,
Canal Bank Building,
New Orleans, Louisiana.

Dear, Sirs:

This is to advise that under the provisions of the contract between Iberia Oil Corporation and Y. D. Spell and

William Helis, I have designated as an umpire Mr. W. L. Massie of Houston, Texas, and copy of my letter of designation is herewith enclosed.

Yours very truly,
(Sgd.) C. E. HARDIN.

3-W.

Enclosure.

EXHIBIT MARKED "12a," BEING COPY OF LETTER FROM C. E. HARDIN TO W. L. MASSIE, DATED MAY 3, 1935, ATTACHED TO EXHIBIT MARKED "CROSS-PLAINTIFF-12."

(Letterhead of Pujo, Bell & Hardin.)

Lake Charles, La., May 3, 1935.

Mr. W. L. Massie,
c/o Railroad Commission of Texas,
Houston, Texas.

Dear Sir:

I have designated you to act as umpire in the test of a certain oil well situated on the Bernard Lease in Iberia Parish, in accordance with a contract between Iberia Oil Corporation and Y. D. Spell on the one side and Mr. William Helis on the other. The well is designated as Bernard No. 3. You are requested to determine, first, the actual production of three-eighths ($3/8$) choke; second, by using the three-eighths ($3/8$) choke you are to calculate the open flow capacity of the well.

Your fee is to be paid one-half by Iberia Oil Corporation and Mr. Y. D. Spell, both represented by Judge William N. Bonner, Stirling Building, Houston, and the other one-half by Mr. William Helis, who is represented by Judge Lloyd J. Cobb, Canal Bank Building, New Orleans. I

have notified both attorneys and they will confirm these arrangements.

Yours very truly,
(Sgd.) C. E. HARDIN.

3-W.

cc-Judge Wm. N. Bonner,
Stirling Building,
Houston, Texas.

cc-Judge Lloyd J. Cobb,
Canal Bank Building,
New Orleans, Louisiana.

EXHIBIT MARKED "CROSS PLAINTIFF-13," BEING
COPY OF LETTER DATED MAY 6, 1935, FROM
WM. N. BONNER TO LLOYD J. COBB.

144

Filed Feb. 26, 1937.

May 6, 1935.

Lloyd J. Cobb, Attorney,
Canal Bank Building,
New Orleans, Louisiana.

Dear Sir:

In connection with the Iberia Oil Corporation, I advise that my clients for some time have considered it advisable to dissolve that corporation, and during the past week this has been done. Mr. Bryan Ward was named liquidator and the deed from him to Bryan Ward, A. L. Mitchell and L. B. Mhoon is recorded in Book 124, folio 571, deed records of Iberia Parish, Louisiana. The instrument recites:

The grantees hereby assume each and every contract and obligation undertaken by Iberia Oil Corporation, especially all obligations, undertakings, and a certain

contract with amendments executed on the 6th day of February, 1935, with Wm. Helis.

The grantees, as you know, are all citizens of Harris County and Mr. Y. D. Spell, the other owner, is a citizen of Beaumont, Texas.

Understanding that your client is still taking all the oil from this lease without authority from my clients and without having exercised any option or paid one cent for this lease, I am preparing to notify J. S. Abercrombie not to deliver or permit to be delivered to your client any more oil through his pipe line and tanks after the expiration of your option period unless in the meantime you have exercised your option and paid \$200,000 cash and co-operated in filling in the blank in the conveyance with \$200,000 to be paid from oil. You are advised that unless the option shall be exercised on that basis, these two wells will thereafter be operated either by my clients, abiding by the proration laws of the United States and of the State of Louisiana, or by a receiver appointed by a Court of competent jurisdiction, who, I assume, of course, will do the same thing. If you can advise what

oil your client has taken from the lease and the
 144a reasonable cost of drilling well #3, we will see that proper division orders are executed to assure your client getting 7/16 of the oil from the lease until the cost of well #3 shall be fully re-paid to you. I had expected from what you said that the cost of #3 well would probably be sent me before this time.

You are advised that the cost of drilling #2 well by my clients was \$15,530.34. I have asked clients to send you today copy of invoices fully paid. You are further advised that all gross production taxes have been paid by clients on all oil run up to April 1st, this being the last time they ran any oil. At that time there was approximately 2,000 barrels left on the lease for fuel and other purposes, which had been produced prior to that date, and they are of course entitled to be paid for this if your client exercises his option. Anything further desired or contemplated by the contract client will

gladly furnish now or later if the option is exercised on the basis of \$400,000 valuation for the property.

In conclusion I want to assure you that, although I cannot justify the position of your client in this matter, I do not propose for a moment that my client shall be led into an unjustifiable position, and they stand ready to carry out the contract in letter and in spirit. This notwithstanding the fact that the lease is now worth far more than the \$400,000 which the contract provided they should receive (I think it is worth twice as much), and I am rather definitely of the opinion that they would be justified in treating your client's conduct as a repudiation of the contract and rescinding it altogether. What I have said here is wholly without prejudice to their rights in this respect, if the option is not exercised on the basis of \$400,000 contracted for and all other parts of the contract performed as was originally intended.

If you should desire to conclude this matter in this spirit and will advise me, I will see that all reasonable assurances are given to this end.

Very truly yours,

145 (Sgd.) WM. N. BONNER.

P. S. I enclose invoice for the oil on hand April 1st, which, less royalty, is \$1,918.90.

EXHIBIT MARKED "CROSS PLAINTIFF-14," BEING
COPY OF LETTER DATED MAY 9, 1935, FROM
..... TO LLOYD J. COBB.

146 Filed Feb. 26, 1937.

May 9, 1935.

Lloyd J. Cobb, Attorney,
Canal Bank Building,
New Orleans, Louisiana.

Dear Sir:

Clients have notified me of the receipt from Wm. Helis of his exercise of his option to purchase the Bernard Lease at the price of \$400,000, \$200,000 cash and \$200,000

in oil, etc., and I am making every effort to see that the matter is concluded in a way satisfactory to you.

I enclose letter from J. S. Abercrombie, dated May 8th, showing that his company has paid all gross production taxes on the oil to April 1st, and that all royalties have been paid by his company. (2) Carbon copy of release which has been executed by Warich Oil Corporation, reciting receipt of \$15,593.52, in full payment of all claims against the lease and its owners. (3) Oil Well Supply Company, who holds a mortgage of some character against the interest of Y. D. Spell, advised me from Dallas this morning that they were executing a release of this and were forwarding same to the writer, to be delivered upon the payment of the sum of about \$17,000, and I immediately telegraphed their attorney, Mr. Finlay, to mail you direct a carbon copy of the release, so that you would have an opportunity in advance of approving the form.

Now in view of the more definite and somewhat changed situation it occurred to me that you would probably wish to alter slightly the form of the assignment from Mitchell, Ward and Mhoon. The form attached to the contract provides, for instance, that the assignment shall "include all oil produced from all wells located on the leased premises from and after the date of the completion of the well known as Bernard #2." You and I have agreed that April 1st was the proper date for

147 your client to receive production from well #1, and it occurred to me that you might prefer to so state in the assignment. Again, since Iberia Oil Corporation has been dissolved and Mr. Bryan Ward, Liquidator, has conveyed the property to himself and Messrs. Mhoon and Mitchell (I have heretofore given you reference to the deed records of Iberia Parish where the conveyance is recorded), I am uncertain as to whether you will wish Iberia Oil Corporation to join in the conveyance or not, but this may be as you prefer. I have no doubt but that a conveyance from Mitchell, Ward and Mhoon would be good and sufficient but if for any reason you prefer the joinder of Iberia Oil Cor-

poration, now dissolved, the corporate seal is here, and if you will draft the instrument I will have it executed in such form as you desire. Clients will also furnish \$200 in revenue stamps, which we understand to be the correct amount for the conveyance.

I had rather expected to hear from you by today in response to my last letter in which I gave you the cost of drilling No. 2 well as \$15,530.34 and the value of oil representing royalty on the lease produced prior to April 1st as \$1890.90.

Through the office of Abercrombie Company I get the intimation that you or your client may be here soon to perfect some contract with them, presumably with reference to pipe line, storage, etc., and it occurred to me that you might prefer a well to conclude the transaction here. If I may now have approval of these instruments and copy of the deed which you wish executed, I think I could come to New Orleans next Monday if this suits you and conclude the matter there, or if you prefer to wait longer this may be indicated by you.

The sellers, as you know, owe considerable money and in order to secure and furnish you completely executed releases from Oil Well Supply Company, Warich Oil Corporation, and perhaps others, it will probably be necessary that the matter be handled through a local bank, which will advance these funds and make certain adjustments, payments, etc., and receive and credit therefor proceeds of your client's payment. If it happens

148 that you are coming here to conclude the matter, this could all be arranged in a few moments, or, for that matter, I think I can arrange for all proper releases and assignments in the event it is deemed proper that I come there for the purpose, I do not desire to make the trip to New Orleans unless it is necessary, and if I do come I would like to have a definite appointment, if possible, for concluding the matter so that I may not be detained more than one day.

The reserved oil payments from the lease should be payable as follows: Y. D. Spell, 1/3; A. L. Mitchell, 1/3; Bryan Ward, 1/6; and A. B. Mhoon, 1/6.

Since beginning this letter Mr. Abercrombie has sent photostatic copies of the last production tax receipts, received at his office today. The check showing payment of royalty is enclosed in order that you may see how the royalty has been paid, and the proportions. These payments have been made by Abercrombie Company.

After you have examined these instruments and the one which you will receive from Dallas, I wish you would send me a collect day letter stating if they are in proper form and whether you are preparing the assignment or wish me to do so, and in the latter event whether I shall include as a grantor Iberia Oil Corporation and/or Bryan Ward, Liquidator, or merely the three individual owners; also indicate your convenience with respect to time and place for finally concluding this transaction.

With kind personal regards, I am

Very truly yours,

wmnb aa.

(Handwritten): I wish you would as a personal favor to me write Judge Hardin a word of kindly greeting. This you will never regret but will think better of as time passes.

(Sgd.)

WNB.

**EXHIBIT MARKED "CROSS PLAINTIFF-15," BEING
TELEGRAM DATED MAY 11, 1935, FROM COBB
& JONES TO WILLIAM N. BONNER.**

149

Filed Feb. 26, 1937.

Western Union.

1935 May 11 AM 10 21

HS26 119 DL—New Orleans La 11 942A

William N. Bonner
Sterling Bldg.

Your letter May ninth received form of release executed by Oil Well Supply Company not satisfactory as it

should recite surrender to Notary and proper cancellation of mortgage note stop Deed from Bryan Ward is not in conformity with contract and all parties must join in deed stop Revenue stamps unnecessary under Louisiana law stop Costs No. two well being analyzed stop Unable to see you Monday stop Wire me actual date completion Barnard number two well and quantity of oil produced thereafter stop Did J. S. Abercrombie purchase all oil produced from Barnard number one since it first went on production stop Contract provides for method of concluding transaction stop Foregoing with full reservation of our clients rights.

COBB & JONES.

(Seal of Warich Oil Corporation.)

EXHIBIT MARKED "CROSS PLAINTIFF-16," BEING COPY OF TELEGRAM FROM WM. N. BONNER TO WILLIAM HELIS, DATED MAY 14, 1935.

150

Filed Feb. 26, 1937.

Western Union.

May 14, 1935.

Mr. William Helis
914 Masonic Temple Building
New Orleans

Have placed in National Bank of Commerce all papers required by Lloyd J. Cobb your attorney whom I presume acts with your full authority stop Just advised that after you paid drafts drawn by Mitchell Mhoon Spell and Ward funds were attached and garnished stop As you and your attorney well know these papers forwarded on express condition that payment be made and remittance sent here which you have through tomorrow to complete stop Unless funds sent here tomorrow I demand all papers be returned and your failure to do one or the

other I advise will constitute repudiation of the contract and failure to exercise option and will advise clients to immediately resume possession of lease and operate same according to law and if any resistance is met application for receiver will be applied for forthwith to operate the lease during course litigation stop Abercrombie will be notified tomorrow night to permit no more oil to be delivered through his facilities and he advises me that this instruction will be followed stop Please acknowledge receipt.

WM. N. BONNER.

Day letter—Paid.

Chg. Wm. N. Bonner, Sterling Bldg.

EXHIBIT MARKED "CROSS PLAINTIFF-17," BEING TELEGRAM DATED MAY 15, 1935, FROM COBB AND JONES TO WILLIAM BONNER.

151

Filed Feb. 26, 1937.

Western Union.

1935 May 15 PM 1.44.

HS82 132 DL—New Orleans La 45 1253P

William Bonner

Attorney at Law Sterling Bldg.

All funds seized in attachment suit except fifty thousand dollars released by plaintiff without prejudice stop Helis will pay balance applicable purchase price according to contract out proceeds of one fourth of seven eighths oil produced stop If litigation has not settled dispute at proper time any funds in controversy will be duly deposited in registry of Court or under escrow agreement protecting interest of all parties on outcome of suit stop Suggest you reconsider advising clients to resume posses-

sion as it would be inadvisable for them to trespass upon property stop. Under Louisiana statutes pipeline may be made public utility stop If your clients interfere with movement oil through it we will hold you liable for all damages and particularly damages and penalties provided by Act Seventy Six of Nineteen Twenty.

COBB AND JONES.

EXHIBIT MARKED "CROSS PLAINTIFF 18", BEING
STATEMENT NET MONTHLY PRODUCTION,
ETC.

152

Filed Feb. 26, 1937.

Production—Bernard Lease.

Inv.	2,090.66
	79,776.26
	73,423.10
	81,469.56
	81,235.65
	80,446.32
	95,651.09
	93,887.52
	95,218.89
	95,981.38
	89,361.44
	96,245.16
	92,776.27
	95,366.57
	91,702.44
	94,126.73
	94,039.81
	91,511.94
	94,296.92
	91,020.28
	92,947.33
	1,802,565.32*

**Net Monthly Production—Petit Bayou District from
Beginning of Operation Thru December 31, 1936.**

	W. J. Bernard Lease	Sabatier Lease
Inventory, April 21, 1935	2,090.66 Bbls. Bbls.
April & May, 1935.....	79,776.26
June	73,423.10
July	81,469.56
August	81,235.65
September	80,446.32
October	95,651.09
November	93,887.52	284.21.
December	95,218.89	686.54
January, 1936	95,981.38	696.96
February	89,351.44	456.93
March	96,245.16	524.99
April	92,776.27	339.82
May	95,366.57	291.38
June	91,702.44	237.42
July	94,126.73	188.86
August	94,039.81	191.55
September	91,511.94	40.47
October	94,296.92
November	91,020.28	— 35.57 (red ink)
December	92,947.33	51.27
	<hr/>	<hr/>
	1,802,565.32 Bbls.	3,954.83 Bbls.

Jan., 1937.

PLAINTIFF'S EXHIBIT MARKED "D-1," BEING LETTER DATED JUNE 17, 1935, TO CHALMETTE REFINING CO. FROM A. L. MITCHELL, ET AL.

154

Filed Feb. 26, 1937.

Houston, Texas, June 17th, 1935.

Chalmette Refining Co.,
922 Union Indemnity Bldg.,
New Orleans, La.

Gentlemen:

We have been advised by Mr. Lloyd J. Cobb, attorney for Wm. Helis, who several weeks ago exercised his option for the Bernard Lease at New Iberia, Louisiana, that you have been purchasing the output from these wells for the past several weeks and due to our not having heard anything regarding what disposition you are making of the 1/4th or 7/8ths of the proceeds for this oil we would appreciate it if you would advise us as to whether or not it is being paid for and to whom.

We feel sure that you have undoubtedly examined this abstract and if you have you are aware of the fact that A. L. Mitchell, A. B. Mhoon and the writer and Y. D. Spell are to be paid a substantial sum from the 1/4th of 7/8ths of the oil produced and sold from the Bernard lease. Awaiting your reply, we are,

Yours very truly,

A. L. MITCHELL,

A. B. MHOON &

BRYAN WARD,

By (Sgd.) BRYAN WARD.

BW: MJW.

Received June 18, 1935, at Main Office.

EXHIBIT D-2, BEING DRAFT TO WM. HELIS
FOR \$215,530.34.

Filed February 26, 1937.

THE UNION NATIONAL BANK



CUSTOMER'S
DRAFT

D-2 Houston, Texas, MAY 11 1935

\$215,530.34

Pay to the
order of THE UNION NATIONAL BANK, HOUSTON, TEXAS

IN 12510215530 34 CIL

15642

Dollars

Documents Attached

N.P.

MAY 19 1935

value received, and balance same to account of

THE UNION NATIONAL BANK

To William Helis
First National Bank of Commerce
New Orleans La

W. Soule

200

THE UNION NATIONAL BANK, HOUSTON, TEXAS
15642

By [Signature]

August 1935
and 5/13/35

5270

1935

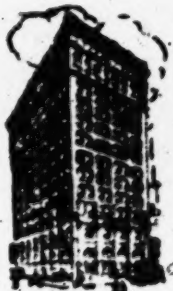
[Signature]

EXHIBIT D-3, BEING DRAFT TO WM. HELIS
FOR \$1,918.90.

Filed February 26, 1937.

157

THE UNION NATIONAL BANK



CUSTOMER'S
DRAFT

D-3

Houston, Texas,

MAY 11 1935

\$1918.90

Pay to the
order of

THE UNION NATIONAL BANK, HOUSTON, TEXAS

MAY 14 1935

Nineteen Hundred Eighteen & 90/100

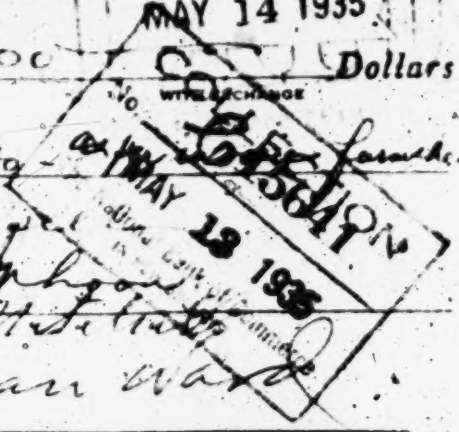
Dollars

Oil on Hand - 4/1/35 produce & from thirty

value received, and charge same to account of

To Helis
Through National Bank of Commerce
New Orleans La

W.B. Morgan
G.H. White
L. Man Ward



UNION NATIONAL BANK, HOUSTON, TEXAS

U.S. DISTRICT COURT
HOUSTON, TEXAS
MAY 23 1935

**EXHIBIT MARKED "D-4," BEING COPY OF LETTER
DATED JUNE 22, 1935, FROM WILLIAM HELIS
TO BRYAN WARD.**

157

Filed Feb. 26, 1937.

June 22, 1935.

**Mr. Bryan Ward,
Houston, Texas.**

Dear Sir:

I am enclosing herewith a statement from Chalmette Petroleum Corporation showing the proceeds derived from the sale of the seven-eighths (7/8ths) working interest in the oil produced from the Bernard Tract in Iberia Parish through May 31st, 1935, together with my check for $\frac{1}{6}$ of $\frac{1}{4}$ th of such proceeds. This remittance is being made without prejudice to the pending suit for the recovery of the amount which I have previously overpaid you, and is also without prejudice to any rights which I have or may have to question at any time the sum said to have been expended by you in the drilling of the Bernard No. 2 well and neither this payment nor any payment which may hereafter be made to you shall be construed as an admission of liability either for the purchase price of \$400,000.00 which you claim, and which I deny to be correct, or for the sum which you claim to have expended in the drilling of the Bernard No. 2 well.

Yours very truly,

WILLIAM HELIS,

By

HLH/JD.

Office Manager.

**EXHIBIT MARKED "D-5," BEING COPY OF LETTER
DATED JUNE 22, 1935, FROM WILLIAM HELIS.
TO Y. D. SPELL.**

158

Filed Feb. 26, 1937.

June 22, 1935.

**Mr. Y. D. Spell,
2215 Blandhette Street,
Beaumont, Texas.**

Dear Sir:

I am enclosing herewith a statement from Chalmette Petroleum Corporation showing the proceeds derived from the sale of the seven-eighths (7/8ths) working interest in the oil produced from the Bernard Tract in Iberia Parish through May 31st, 1935, together with my check for 1/3 of 1/4th of such proceeds. This remittance is being made without prejudice to the pending suit for the recovery of the amount which I have previously overpaid you, and is also without prejudice to any rights which I have or may have to question at any time the sum said to have been expended by you in the drilling of the Bernard No. 2 well and neither this payment nor any payment which may hereafter be made to you shall be construed as an admission of liability either for the purchase price of \$400,000.00 which you claim, and which I deny to be correct, or for the sum which you claim to be expended in the drilling of the Bernard No. 2 well.

Yours very truly,

WILLIAM HELIS,

By

HLH/JD.

Office Manager.

**EXHIBIT MARKED "D-6," BEING COPY OF LETTER
DATED JUNE 22, 1935, FROM WILLIAM HELIS
TO A. B. MHOON.**

159

Filed Feb. 26, 1937.

June 22, 1935.

**Mr. A. B. Mhoon,
Houston, Texas.**

Dear Sir:

I am enclosing herewith a statement from Chalmette Petroleum Corporation showing the proceeds derived from the sale of the seven-eighths (7/8ths) working interest in the oil produced from the Bernard Tract in Iberia Parish through May 31st, 1935, together with my check for 1/6 of 1/4th of such proceeds. This remittance is being made without prejudice to the pending suit for the recovery of the amount which I have previously overpaid you, and is also without prejudice to any rights which I have or may have to question at any time the sum said to have been expended by you in the drilling of the Bernard No. 2 well and neither this payment nor any payment which may hereafter be made to you shall be construed as an admission of liability either for the purchase price of \$400,000.00 which you claim, and which I deny to be correct, or for the sum which you claim to have expended in the drilling of the Bernard No. 2 well.

Yours very truly,

WILLIAM HELIS,

By

Office Manager.

HLH/JD.

**EXHIBIT MARKED "D-7," BEING COPY OF LETTER
DATED JUNE 22, 1935, FROM WILLIAM HELIS
TO A. L. MITCHELL.**

160

Filed Feb. 26, 1937.

June 22, 1935.

**Mr. A. L. Mitchell,
Humble, Texas.**

Dear Sir:

I am enclosing herewith a statement from Chalmette Petroleum Corporation showing the proceeds derived from the sale of the seven-eighths (7/8ths) working interest in the oil produced from the Bernard Tract in Iberia Parish through May 31st, 1935, together with my check for 1/3 of 1/4th of such proceeds. This remittance is being made without prejudice to the pending suit for the recovery of the amount which I have previously overpaid you, and is also without prejudice to any rights which I have or may have to question at any time the sum said to have been expended by you in the drilling of the Bernard No. 2 well and neither this payment nor any payment which may hereafter be made to you shall be construed as an admission of liability either for the purchase price of \$400,000.00 which you claim, and which I deny to be correct, or for the sum which you claim to have expended in the drilling of the Bernard No. 2 wells.

Yours very truly,

WILLIAM HELIS,

By

HLH/JD.

Office Manager.

EXHIBIT MARKED "D-8," BEING COPY OF TELEGRAM DATED MAY 11, 1935, FROM COBB & JONES TO WILLIAM N. BONNER.

161

Filed Feb. 26, 1937.

Western Union.

New Orleans, Louisiana, May 11, 1935.

William N. Bonner,
Sterling Building,
Houston, Texas.

Your letter May ninth received form of release executed by Oil Well Supply Company not satisfactory as it should recite surrender to notary and proper cancellation of mortgage note stop Deed from Bryan Ward is not in conformity with contract and all parties must join in deed stop Revenue stamps unnecessary under Louisiana law stop Costs No. two well being analyzed stop Unable to see you Monday stop Wire me actual date completion Bernard Number Two well and quantity of oil produced thereafter stop Did J. S. Abercrombie purchase all oil produced from Bernard Number One since it first went on production stop Contract Provides for method of concluding transaction stop Foregoing with full reservation of our clients rights.

COBB & JONES.

Chg.—Cobb & Jones.

EXHIBIT MARKED "D-9," BEING TELEGRAM DATED MAY 14, 1935, FROM WM. N. BONNER TO WILLIAM HELIS.

162

Filed Feb. 26, 1937.

Western Union.

1935 May 14 PM 4 50.

HSA355 176 DL 1/140—DS Houston Tex. 14 343P.

William Helis,

914 Masonic Temple Bldg. NRLNS.

Have placed in National Bank of Commerce all papers required by Lloyd J. Cobb your attorney whom I pre-

sume acts with your full authority stop Just advised that after you paid drafts drawn by Mitchell Mhoon Spell and Ward funds were attached and garnished stop As you and your attorney well know these papers forwarded on express condition that payment be made and remittance sent here which you have through tomorrow to complete stop Unless funds sent here tomorrow I demand all papers be returned and your failure to do one or the other I advise will constitute repudiation of the contract and failure to exercise option and will advise clients to immediately resume possession of lease and operate same according to law and if any resistance is met application for receiver will be applied for forthwith to operate the lease during course litigation stop Abercrombie will be notified tomorrow night to permit no more oil to be delivered through his facilities and he advises me that this instruction will be followed stop Please acknowledge receipt.

WM. N. BONNER.

EXHIBIT MARKED "D-10," BEING TELEGRAM
DATED MAY 11, 1935, FROM WM. N. BONNER
TO LLOYD J. COBB.

163

Filed Feb. 26, 1937.

Western Union.

1935, May 11 PM 1 25.

HSA300 81 DL—DS Houston Tex. 11 111P.

Lloyd J. Cobb, Attorney,
Canal Bank Bldg., NRLNS.

Your clients finished Bernard Two I understand April eighteenth which is actual completion date but on your own suggestion I had agreed to effective date as April first to which time clients have been paid stop Abercrombie Company has handled all oil from beginning stop All papers should be at your bank Monday morning and in sending them full right is reserved to show in

answer to any action you bring that minds of parties never met and therefore contract void.

WM. N. BONNER.

EXHIBIT MARKED "D-11," BEING TELEGRAM DATED MAY 15, 1935, FROM A. M. ALVERSON TO COBB AND JONES.

164

Filed Feb. 26, 1937.

Western Union.

1935 May 15 PM 3 18.

HSA347 27 DL 1 Extra—DS Houston, Tex., 15 304P.

Cobb and Jones, Attorneys,
Canal Bank Bldg., NRLNS.

Judge Bonner absent for afternoon understand he will be in New Orleans tomorrow or Friday and suppose will confer with you believe receivership petition in preparation there.

A. M. ALVERSON, Secretary.

EXHIBIT MARKED "D-12," BEING LETTER DATED DECEMBER 16, 1935, FROM W. D. GORDON TO CANAL OIL COMPANY, INC.

165

Filed Feb. 26, 1937.

W. D. Gordon,
Attorney at Law,
Beaumont, Texas.

December 16, 1935.

Canal Oil Company, Inc.,
1013 Whitney National Bank Bldg.,
New Orleans, Louisiana.

Gentlemen:

I am writing to you on behalf of Mr. Y. D. Spell to whom you have mailed a check, numbered 246, dated

December 13, 1935, for \$1287.79, being a part of the payment out of oil under your contract of purchase.

It appears from this that your check is intended to cover the balance of \$100,000.00 of this oil payment. I gather this from a typewritten memorandum enclosed with the check to Mr. Spell.

What Mr. Spell desires is the payment of the balance of the \$150,000.00 oil payment conceded to be due under your construction of your contract. And I write this letter requesting that you pay him thereunder the pro-rata share of the oil stipulated for under your own construction of the contract.

I would like to have an answer to this letter at your earliest convenience.

Very truly yours,

(Sgd.) W. D. GORDON.

166 EXHIBIT MARKED "D-13," BEING COPY OF
LETTER DATED DECEMBER 23, 1935,
FROM COBB & JONES TO W. D.
GORDON.

Filed Feb. 26, 1937.

December 23rd, 1935.

Mr. W. D. Gordon,
Attorney at Law,
Beaumont, Texas.

Dear Mr. Gordon:

Your letter of December 16th addressed to Canal Oil Company, Inc., has been referred to us by Mr. William Helis for reply.

Our client has paid Mr. Y. D. Spell and Messrs. Ward, Mitchell and Mhoon the entire amount due them under the contract of purchase. Under our construction of the contract \$150,000.00 was payable out of oil and as \$50,000.00 was overpaid at the time the transaction was consummated and \$100,000.00 has been paid since, we do

not quite understand on what basis you are claiming any additional amount. We shall be pleased to hear from you further.

Very truly yours,
COBB & JONES,

By

LJC:P.

CC—Mr. William Helis.

EXHIBIT MARKED "D-14," BEING COPY OF LETTER
DATED MAY 28, 1935, FROM WM. N. BONNER
TO WEEKS AND WEEKS.

167

Filed Feb. 26, 1937.

May 28, 1935.

Weeks and Weeks, Attorneys,
New Iberia, Louisiana.
Gentlemen:

Willy J. Bernard 60-acre Lease, Formerly Owned
by Iberia Oil Corporation.

Messrs. Cobb and Jones, Attorneys, Canal Bank Building, New Orleans, are very desirous of obtaining definite information showing a release of two certain leases which formerly existed on this tract, executed by the Bernards to (a) Lake Oil Corporation, and (b) Southwestern Oil & Mineral Co., Inc. I am certain that these old leases were abandoned or expired by their own terms long before the lease from the Bernards to Warich Company, or, for that matter, before the lease from the Bernards to Gulf and Humble Companies, but I assume that no oil payments will be made by the pipe lines company until these releases are furnished.

Will you be good enough to see Mr. Bernard and have him supply the proper affidavits and mail the originals

to Messrs. Cobb & Jones at the above address, in order that royalty payments may not be held up.

Very truly yours,

(Sgd.) WM. N. BONNER.

wmnbaa.

cc—Cobb & Jones,

Canal Bank Bldg., New Orleans.

(Handwritten): Cobb: My clients here have nothing on this at all. Joe Moore atty. for Abercrombie approved the title for them.

WM. N. B.

EXHIBIT MARKED "D-17," BEING COPY OF TELEGRAM DATED APRIL 25, 1935, FROM COBB & JONES TO IBERIA OIL CORPORATION, INC.

168

Filed Feb. 26, 1937.

Western Union.

New Orleans, Louisiana, April 25th, 1935.

Iberia Oil Corporation, Inc.,

1706 Sterling Building,

Houston, Texas.

Relative contract between Iberia Oil Corporation Y. D. Spell and William Helis and capacity Bernard Number Three well as determined by contract dated February sixth nineteen hundred thirty five you are advised that our client William Helis has been and is at all times ready and willing to gauge well in accordance with agreement at any time convenient to you and Y. D. Spell stop Wire immediately when you desire to make test.

COBB & JONES,

Attorneys for William Helis.

842 Canal Bank Bldg.

EXHIBIT MARKED "D-18," BEING COPY OF WESTERN UNION TELEGRAM DATED APRIL 25, 1935, FROM WILLIAM HELIS TO Y. D. SPELL.

169

Filed Feb. 26, 1937.

New Orleans, Louisiana, April 25th, 1935.

Y. D. Spell,

2215 Blanchett Street,

Beaumont, Texas.

In accordance with our contract dated February sixth nineteen thirty five I will make test with you or your representatives of capacity of Bernard Number Three well at anytime convenient to you and Iberia Oil Corporation stop Please wire.

WILLIAM HELIS.

Chg. Cobb & Jones,

842 Canal Bank Bldg.

EXHIBIT MARKED "D-19," BEING COPY OF LETTER DATED APR. 26, 1935, FROM COBB & JONES TO WILLIAM N. BONNER.

170

Filed Feb. 26, 1937.

April 26th, 1935.

Mr. William N. Bonner,

Attorney at Law,

Sterling Building,

Houston, Texas.

Dear Mr. Bonner:

We duly received your telegram of April 26th advising that E. O. Buck has been designated by your clients to meet with the representatives of Mr. Helis at the Frederic Hotel at New Iberia early tomorrow and have wired that this appointment is satisfactory.

From the time the well commenced production Mr. Helis has been and is now of opinion that it is incapable

of producing more than three thousand barrels of oil per day on a three-eighths inch choke as stated in the contract of February 6th, 1935, and our view is that the applicable purchase price as set forth in the contract is \$300,000.00 instead of \$400,000.00 as indicated in your letter. However, a test of the well will be made tomorrow and we hope that all parties will be satisfied.

With best personal regards, we are,

Very truly yours,

COBB & JONES,

LJC:GK.

By

**EXHIBIT MARKED "D-24," BEING COPY OF LETTER
DATED MAY 1, 1935, FROM COBB & JONES TO
JUDGE C. E. HARDIN.**

171

Filed Feb. 26, 1937.

May 1st, 1935.

Judge C. E. Hardin,

c/o Messrs. Pujo, Bell & Hardin,

Attorneys at Law,

Lake Charles, Louisiana.

Dear Sir:

Confirming our long distance telephone conversation of today wherein you advised me you expected to be employed as counsel for the sellers should the contract between Iberia Oil Corporation, Y. D. Spell and Mr. Helis dated February 6th, 1935, wind up in a law suit, you are advised that there is nothing we can add to our telegram of today which sets forth our position in detail.

Very truly yours,

COBB & JONES,

LJC:N.

By

**EXHIBIT MARKED "D-25", BEING COPY OF LETTER
DATED MAY 3, 1935, FROM C. E. HARDIN TO W.
L. MASSIE.**

172

Filed Feb. 26, 1937.

Pujo, Bell & Hardin,
Lake Charles, La.

May 3, 1935.

Mr. W. L. Massie,
c/o Railroad Commission of Texas,
Houston, Texas.

Dear Sir:

I have designated you to act as umpire in the test of a certain oil well situated on the Bernard lease in Iberia Parish, in accordance with a contract between Iberia Oil Corporation and Y. D. Spell on the one side and Mr. William Helis on the other. The well is designated as Bernard No. 3. You are requested to determine, first, the actual production of three-eighths ($3/8$) choke; second, by using the three-eighths ($3/8$) choke you are to calculate the open flow capacity of the well.

Your fee is to be paid one-half by Iberia Oil Corporation and Mr. Y. D. Spell, both represented by Judge William N. Bonner, Stirling Building, Houston, and the other one-half by Mr. William Helis, who is represented by Judge Lloyd J. Cobb, Canal Bank Building, New Orleans. I have notified both attorneys and they will confirm these arrangements.

Yours very truly,
(Sgd.) C. E. HARDIN.

3-W.

cc—Judge Wm. N. Bonner,
Stirling Building,
Houston, Texas.

cc—Judge Lloyd J. Cobb,
Canal Bank Building,
New Orleans, Louisiana.

**EXHIBIT MARKED "D-27," BEING COPY OF LETTER
DATED MAY 5, 1935, FROM COBB & JONES TO
JUDGE C. E. HARDIN.**

173

Filed Feb. 26, 1937.

May 5th, 1935.

**Judge C. E. Hardin,
Attorney at Law,
Weber Building,
Lake Charles, Louisiana.**

Dear Sir:

Receipt is acknowledged of your letter of May 3rd advising that you have designated as an umpire Mr. W. L. Massie of Houston, Texas, as per copy of your letter to him of the same date.

At the time the agreement between Iberia Oil Corporation, Y. D. Spell and Mr. Helis, dated February 6th, 1935, was executed, Judge Bonner suggested that you name a reputable engineer to act as umpire in the event the parties themselves failed "to agree on the proper gauge on the well or wells" to be tested as provided in Paragraph No. 3 of the contract. Reposing confidence in your integrity we acquiesced in Judge Bonner's suggestion. After the well was brought in as a producer, Iberia Oil Corporation and Y. D. Spell immediately asserted a claim which we regard as utterly ridiculous. The well has never produced more than 3000 barrels per day on a 3/8 inch choke and it is admitted by Judge Bonner and everybody else that it is incapable of so doing. However, the sellers have insisted and are insisting that you have the right to appoint an engineer who will "calculate" or make a scientific (?) guess as to the open flow capacity of the well which they erroneously claim determines the purchase price under the contract, although at the time it was executed the parties well knew that the average daily production for the test period of fifteen

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days would be determined by taking the actual production on a 3/8 inch choke say for two hours or any other period "according to the methods usually employed in gauging the capacity of oil wells" and multiplying the production during such period by the applicable number of hours per day to determine the production per day.

In other words if the well produced 200 barrels in two hours on a 3/8 inch choke the average daily production "according to the methods usually employed in gauging the capacity of oil wells"

174 would be as Calculated by the contract 2400 barrels per day. It is beyond question that no well in the gulf coastal region could be produced on an open flow for fifteen days which is the test period, for it would kill the well forever. The parties knew this and agreed to the determination of the capacity on a 3/8 inch choke. In view of the concession that the average daily production of the well so calculated during the test period is less than 3000 barrels, there is no necessity for the appointment by you of an engineer to act as umpire and we have so advised you and in addition thereto your authority and the authority of such engineer are limited to the contract and the letter of February 6th, 1935, which specifically says the engineer is to be appointed only "in the event they (the parties) fail to agree on the proper gauge on the well." The mathematical calculation of the capacity of the well as stated is the test to be applied in determining the applicable purchase price and does not require the services of an engineer who can only make a wild guess.

Notwithstanding the foregoing, Judge Bonner requested me to meet him at Houston on April 30th, 1935, to discuss various other matters. The question of the appointment of an engineer by you had not been considered by me or discussed with Judge Bonner. Naturally I was quite surprised to meet you in Judge Bonner's office and more surprised to be advised by you that you intended to make an appointment that very day, stating that Judge Bonner had suggested to you two engineers

named Gill and Bennett, one of whom you apparently intended to appoint. I objected and you grudgingly gave me until the next day to suggest names. You then desired to know who would pay for the services of the engineer to be appointed and after some discussion I agreed to pay one-half, with full reservation of all our rights. I also offered to pay one-half your fee and expenses as I knew that you had come all the way from Lake Charles to Houston to make the appointment although I had not requested you to do so and knew nothing about your being invited by Judge Bonner to come to Houston for this purpose.

175

You refused to accept my offer which conduct on your part I can very well understand now, although I could not believe it then, in view of your action the following day in calling me over long distance upon receipt of my wire and advising me that "you did not know what to do as you did not want to lose any law business and you expected to represent the sellers should the matter develop into a law suit." I told you I could not help you out of your dilemma. Your designation by both parties to appoint an umpire placed you in a highly fiduciary capacity owing loyalty to both sides and we are unable to reconcile with principles of fair play your action in accepting employment by the sellers, either actually or tentatively, and at the same time assuming to appoint an engineer to make a wild guess on the capacity of an oil well. We are quite disappointed in your attitude and protest the appointment for the reasons we have heretofore protested and for the additional reason that your acceptance of employment, or the prospect of employment by one side, disqualified you from acting in a fiduciary and judicial capacity which required you to be free from all influence of reward. At the proper time the propriety of your action and conduct will be submitted to the proper tribunal as we think your action in making the appointment after you knew you were to be employed by the sellers is repulsive to those high

principles which men for selfish gain sometimes so quickly abandon.

Very truly yours,
COBB & JONES,

LJC:GK:

By

cc—Judge Wm. N. Bonner,
Sterling Building,
Houston, Texas.

EXHIBIT MARKED "D-28," BEING TELEGRAM
DATED MAY 6, 1935, FROM C. E. HARDIN TO
LLOYD J. COBB.

176

Filed Feb. 26, 1937.

Western Union.

1935 May 6 PM 2 59.

CH103 56—SG—Lake Charles, La. 6 248P.

Lloyd J. Cobb,
Canal Bank Bldg., NRLNS.

Your letter fifth with copy to Judge Bonner I am not counsel for Iberia Oil Corporation and Y. D. Spell and do not intend to take employment in this matter because my acceptance of my designation to name an umpire under the agreement precludes my employment I named an engineer after outside investigation as to ability.

C. E. HARDIN.

**EXHIBIT MARKED "D-29," BEING COPY OF LETTER
DATED MAY-6, 1935, FROM COBB & JONES TO
JUDGE C. E. HARDIN.**

177

Filed Feb. 26, 1937.

May 6th, 1935.

Judge C. E. Hardin,
Attorney at Law,
Weber Building,
Lake Charles, La.

Dear Sir:

We have just received your telegram of May 6th as follows:

"Your letter fifth with copy to Judge Bonner I am not counsel for Iberia Oil Corporation and Y. D. Spell and do not intend to take employment in this matter because my acceptance of my designation to name an umpire under the agreement precludes my employment I named an engineer after outside investigation as to ability."

Our position is that under the contract between the parties your position was purely judicial in character and that long before your appointment on May 3rd of Mr. W. L. Massie, you had automatically disqualified yourself to name anybody and that Mr. Massie's appointment and all acts and things done thereunder are absolutely null and void and our client will not be bound thereby.

Very truly yours,

COBB & JONES,

LJC:N.

By

CC to—Judge Wm. N. Bonner,
Sterling Building,
Houston, Texas.

**EXHIBIT MARKED "D-31," BEING LETTER DATED
MAY 6, 1935, FROM WM. N. BONNER TO LLOYD
J. COBB.**

178

Filed Feb. 26, 1937.

Law Office of
Wm. N. Bonner,
Sterling Building,
Houston.

* May 6, 1935.

Lloyd J. Cobb, Attorney,
Canal Bank Building,
New Orleans, Louisiana.

Dear Sir:

I have just received and hasten to reply to copy of letter sent me which you seem to have addressed to Judge C. E. Hardin, of Lake Charles, under date of May 5th.

At the outset I wish to make plain the fact that I think thyou are now due Judge Hardin a genuine apology for having addressed such a letter to him. I refer now, of course, to the concluding paragraph of your letter on the last, or third, page thereof. No fact in the transaction should justly subject Judge Hardin to any embarrassment, and in view of his high standing at the bar and his age, such inferences as you seek to draw will doubtless cause him either intense anger or deeply wound his feelings—depending entirely upon the nature of the individual. Certainly he is not subject to any criticism for anything that he has done, and I will review a few of the facts which I think justify me in saying this.

In the first place, it was understood and agreed that your client would pay \$400,000 for this property, if he exercised his option, if any well drilled during the period was capable of producing over 300,000 barrels at its greatest producing capacity—meaning, of course, wide open. This could be misunderstood by no one, because everyone knew that a well would not be permitted to

flow wide open for fifteen days under generally observed rules of proration, and it was thought by all that it would be tested on a 3/8" choke for perhaps only a few

179 hours a day over a period, and its actual maximum producing capacity could be calculated from the results thus obtained, and this provision was incorporated in the contract. Whether or not you fully agree with the foregoing makes no difference in the conclusion I have expressed above that Judge Hardin was wholly blameless in this matter.

You, your client, and Mr. Smith knew that I was representing Iberia Oil Corporation and Y. D. Spell, for the transaction was consummated in my office, with me as their only attorney, although you had previously prepared the contract in the main in another office when I was not present. When the matter of having three parties gauge the well to determine its capacity came up, it was then agreed that each side would appoint one representative, and when the matter of the third party or umpire came into the discussion your client quite frankly said that because of his political connections in Louisiana and the possibility of any umpire there being subjected to his influence, he would not expect the third party to be named from Louisiana. Mr. Helis personally, in your presence, stated that he would agree that the writer, Wm. N. Bonner, should act as umpire, or that I should name the third man who would be umpire. Not knowing that my commitments would be in the future and knowing that a great deal of my time in the spring would be spent away from Houston (as it has been—in New York and Austin, particularly) I suggested that I not be named, but asked everyone why a lawyer at Lake Charles should not be named. Since your client had offered to leave the entire matter to me, whom he knew to be attorney for the opposite parties, he made no objection to my designating anyone else, and neither did you.

It happens that the writer has never to this day seen the city of Lake Charles except from a train, and has

never personally met any lawyer there, except Judge Pujo, most casually some years ago, and Judge Hardin, in my office on the occasion when you were here last week. I had, however, long heard of Judge Hardin, who formerly lived at Leesville and was a law partner with the former District Judge there. I did not know

180 at the time, however, that this was the same

Hardin who had formerly lived at Leesville and when I mentioned Judge Hardin, of the firm at Lake Charles, I did so with the thought that my clients knew him at least casually (being of the impression that he had once drawn a contract with J. S. Abercrombie which they signed, and had perhaps transacted some small routine business for them). I rather assumed that he was a young man, being the youngest member of the firm, and more likely to be acquainted with work of this type and to be in position to look after such a matter. You and your client readily consented, and therefore the memorandum which was dictated by you to my secretary appointed Judge Hardin (none of us knew his initials) of the firm of Pujo, Bell & Hardin as umpire.

I have heretofore stated to you that this is the first piece of business I have ever had for these clients, and this well had been in and producing several days before I knew it was in and before they had the slightest intimation that your client would not concur with their knowledge that the well under the contract was capable of producing more than 3,000 barrels, and if the option was exercised it would be on the basis of \$400,000. Finally they did have some intimation of this, however,—I believe from your client in person, or some of his employees, and they advised me of this fact. I at once notified your client that if that be his position I thought the well should be turned over to a committee of representatives from both sides for a test period, and if they failed to agree that an umpire should be named. You wired that this was agreeable, and I as soon as possible thereafter got in touch with Mr. Alex Dursen (to my knowledge one of the

best known petroleum engineers and geologists in all the South), special consultant for all the major companies in this part of the country, and told him the problem involved and stated that I wished him to take charge of the making of tests for us. Mr. Dursen advised that he was leaving town and that he would designate his associate, Mr. E. O. Buck, who I knew had formerly been an engineer for the Gulf Company and for several
 181 years had been engineer for the Railroad Commission of Texas and is now employed by the Conroe Operators Association as chief engineer in charge of the great Conroe Oil Field.

I at once notified you that Mr. Buck was our representative and you stated that you would have a representative there, but it was some time before you gave me the name of Mr. Brashear. The facts with respect to Mr. Brashear not being present at the test have been set forth in Mr. Buck's certificate, copy of which I furnished you, and you stated that Mr. Smith would do as well as Mr. Brashear. Mr. Smith was present during the first test, and both were present during the test made yesterday with the assistance of Mr. Massie, the umpire designated by Judge Hardin.

I had apprised Judge Hardin by telephone of the situation and the fact that I thought he should appoint an umpire, which he agreed to do. In the same conversation I stated to him that you were coming to Houston the following day (as you had stated to me over the 'phone you would do and as you did do, on Tuesday, April 30th). I had suggested to Judge Hardin by telephone that I might come to Lake Charles and might ask you to come there, but naturally I preferred that a meeting be held here, since my clients were all here, and he then said something to the effect that his wife had asked him to bring her to Houston anyway to do some shopping and it would be convenient for him to come here. I then asked him to come since the time was getting short and I wished someone to be appointed mutually satisfactory,

although I was convinced then, as I still am, that any competent engineer would agree with Mr. Buck's previous findings, as indeed several had told me to be the fact after they knew the output through a 3/8" choke, the pressure, etc.

You came to my office about 10 o'clock in the morning, as I recall. Judge Hardin was already here and he and

182 I had visited together and gone over questions concerning Louisiana State University, his former residence at Leesville, and such general matters up to the time of your arrival. Incidentally, not once during his stay here was his possible employment by me or any fee that should be paid him mentioned. As I recall, the only matter of law I discussed with him at all was pertaining to some questions of venue, which, as you recall, I also discussed with you. Just as you were leaving you told me that such questions did not matter because the entire affair would be closed up to my satisfaction and that of my clients and there would never be any Court action or any necessity for any.

After Judge Hardin left my office I did discuss with clients the possibility of some litigation and the advisability of retaining the firm of Pujo, Bell & Hardin, if this litigation was to be at Lake Charles, and if we could first agree upon a fee for their services, and we also discussed under the same circumstances the retention of Mr. Liscow, of Lake Charles, who had procured the charter of Iberia Oil Corporation for my clients, Mitchell, Ward and Mhoon. I learned that Mr. Spell had long looked to a lawyer in Beaumont, W. D. Gordon, as his personal counsel in litigated matters, and that he would doubtless wish Mr. Gordon in the case if the matter should go to Court. I also consulted with my clients with regard to retaining New Orleans lawyers if litigation, if any, should be there rather than Lake Charles or New Iberia.

While here, Judge Hardin stated to me that from your attitude he felt some embarrassment in proceeding to appoint either Mr. Bennett or Mr. Gill, whom I had sug-

gested (though I had never been introduced to or spoken to the latter person in my life), and asked me to advise him at Lake Charles, the name of some other engineer, as he thought you would do and as I understood when you left here you would do. I did call the next day and suggested the name of Mr. Massie, active employee of the Railroad Commission of Texas, who I had been advised was a competent engineer.

183 At my office in the presence of Judge Hardin you stated you had talked to an engineer or engineers who had told you, as I understood, that it was impossible to calculate from what a well made on a 3/8" choke that it would or would not make more than 3,000 barrels on a larger choke, but you declined to give the name of that engineer. You further stated to me that some engineer had told you that it was not impossible for a well to make over 3,000 barrels per day through a 3/8" choke, and that when you made the contract you and your client had in mind that it was not unusual for a well in the Gulf Coast area to make more than 3,000 barrels through a 3/8" choke and that you expected this well to do that to yield the \$400,000 price.

During the several hours you were in my office you will distinctly recall that you took several different positions as to what Judge Hardin should do, and your language to him at one time was such that you saw fit a little later to apologize to him for the use of it, although in my life I have never seen a man more gentile and chivalrous than Judge Hardin appeared and still appears to me to be. At least a dozen times during the conference you stated that you were reserving all rights, and several times that it was useless to appoint any umpire, but finally you stated to him that you did desire him to appoint an umpire and when he called on you for the name of one you stated you had none to give but stated definitely that you would furnish one from New Orleans the following day, either by telegraph or telephone. I was therefore surprised to receive on the

second following day a 300-word telegram you sent him the following day from New Orleans in which you still did not give the name of any engineer, and I am advised you have not done so to this moment. You sent me a copy of this telegram along with a letter stating that your client was attending a wedding in Memphis, Tenn., and therefore you could not give me the cost of drilling well #3, as we had discussed.

184. Since the contract period for making the test was nearing an end and it definitely appeared that you did not wish any umpire appointed, I insisted that Judge Hardin proceed and appoint one, and I know that he investigated Messrs. Gill, Bennett, and Massie, independently from Lake Charles, and I know that he had a conversation by telephone with the son of the United States Judge here and as a result thereof designated in writing Mr. Massie. Copy of his letter so designating Mr. Massie was sent to you. It instructed Mr. Massie to proceed in the exact language you had specifically outlined to Judge Hardin while he was here and which Judge Hardin wrote down on the back of an envelope as you used the words, i. e., first, fix the actual production of $3/8''$ choke; second, by using the $3/8''$ choke you are to calculate the open flow capacity of the well. This both Mr. Massie and Mr. Buck advise me they did on yesterday (they returned to Houston this morning), and both Mr. Brashear and Mr. Smith were present and participated. Mr. Massie and Mr. Buck are firmly of the opinion that the well is capable of making far more than 3,000 barrels per day, even on a $5/8''$ choke to say nothing of open flow. To put themselves in position to determine the accuracy of the gauge on $3/8''$ choke, they tested the well on various chokes, and although your client's representatives on the ground refused to agree to or permit to be made any actual test on any choke over $3/8''$, yet they did agree to a 5-minute test on a $5/8''$ choke, merely for the purpose of securing pressure gauge, and from the well's flow on the different chokes, with the varying pressures, they

calculate the well capable of making a great deal more than 3,000 barrels per day.

In conclusion, I repeat that under the facts Judge Hardin was not disqualified, even if he had been previously retained and paid a fee (and he was neither retained nor paid a fee), to appoint an umpire as had been agreed upon and to give him directions in the very language which you yourself, in my presence and in my office, dictated. This is the very thing that you and your client in the first place agreed that I might do, well knowing that I was employed, and which I preferred should be left to Judge Hardin because of my circumstances and not because I felt disqualified.

Judge Hardin advised me this morning that
185 under the circumstances he preferred that he not be further called on in the matter in any connection, and I have told him I would respect his wishes in the matter; although I did not consider him disqualified to advise my clients if they saw fit to consult him in the future.

I conclude that your client and my clients will probably have extended litigation in this matter, as I have many times had in many other matters, and I assume that you have also, but I have never felt the necessity or propriety of seeking to humiliate an honorable lawyer, whether or not his views coincided with mine in such a matter. It occurred to me that upon a review of these facts you would hasten to extend your apologies to Judge Hardin, which I trust and believe you will feel in duty bound to do, gladly.

Very truly yours,

(Sgd)

WM. N. BONNER.

**EXHIBIT MARKED "D-32," BEING LETTER FROM
C. E. HARDIN TO LLOYD J. COBB, DATED MAY
6, 1935.**

186

Filed Feb. 26, 1937.

Law offices of Pujo, Bell & Hardin,
Weber Building,
Lake Charles, La.

May 6, 1935.

Mr. Lloyd J. Cobb,
Canal Bank Building,
New Orleans, Louisiana.

Dear Sir:

I received your letter of the 5th instant and have just wired you in accordance with the enclosed copy.

I am not concerned about the quarrel between your client and the Iberia Oil Corporation and Mr. Y. D. Spell as to what is meant by the particular clause in dispute. It is a matter of regret that I was designated to name an umpire because of the misunderstanding that has resulted. You are entirely in error in saying that I "grudgingly" gave you until the next day to suggest names. I was certainly anxious for you to submit the names, which was the purpose of my telephone call to you, and when you failed to do so, there was nothing for me to do but select a man on outside investigation, which I did.

My expression to you that I was missing employment by reason of the situation was not intended as a request for any suggestion from you but a statement of the position in which I was placed and, after considering the matter, I concluded that if I were going to name the engineer, it would be proper for me to decline any offer of employment in the case and I am advising Judge Bonner of that fact.

Yours very truly,
(Sgd.) C. E. HARDIN.

3-W.

cc-Judge Bonner.

EXHIBIT MARKED "D-33," BEING COPY OF TELEGRAM DATED MAY 6, 1935, FROM C. E. HARDIN TO LLOYD J. COBB.

187

Filed Feb. 26, 1937.

Lake Charles Louisiana May 6 1935.

Lloyd J. Cobb
Canal Bank Building
New Orleans Louisiana

Your letter fifth with copy to Judge Bonner I am not counsel for Iberia Oil Corporation and Y. D. Spell and do not intend to take employment in this matter because my acceptance of my designation to name an umpire under the agreement precludes my employment I named an engineer after outside investigation as to ability.

C. E. HARDIN.

Paid.
Chg. C. E. H.

EXHIBIT MARKED "D-34," BEING COPY OF LETTER DATED MAY 7, 1935, FROM TO IBERIA OIL CORPORATION, MR. Y. D. SPELL.

188

Filed Feb. 26, 1937.

Registered Mail.

May 7th, 1935.

Iberia Oil Corporation,
1706 Sterling Building,
Houston, Texas.

Mr. Y. D. Spell,
2215 Blanchette Street,
Beaumont, Texas.

Dear Sirs:

In accordance with the contract between us dated February 6th, 1933, as supplemented by our agreement

dated April 1st, 1935, you are notified that I hereby unconditionally exercise the option granted in Paragraph #3 of said contract dated February 6th, 1935, to purchase, for the applicable purchase price as fixed and determined by said contract, and otherwise on the terms and conditions therein stated, your entire² seven-eighths (7/8ths) working interest in and to that certain oil, gas and mineral lease dated September 28th, 1931, by Willy J. Bernard, et al., in favor of E. V. Richard, duly registered in the Conveyance Office for the parish of Iberia, Louisiana, in Book #117 at folio #562 and acquired by you by mesne conveyance, including all oil produced from all wells from the day of completion of your Bernard No. 2 well, and also all physical equipment used and useful in connection with the operation of the said lease, except that expressly excluded by the contract. Under said contract you are required to transfer to me a full seven-eighths (7/8ths) working interest free and clear of any and all liens and encumbrances whatsoever. Any existing oil payments are to be paid and fully discharged out of the cash portion of the purchase price contemporaneously with the payment thereof by me, and you are also required under Paragraph #7 of said agreement to produce prior to or at the time of payment

189. of the cash portion of the purchase price, "satisfactory evidence showing the payment, as of the date of the transfer of the leasehold estate to me, of all severance and production taxes due on oil theretofore produced and also the payment of all royalties due on oil theretofore produced." We interpret this latter provision of the contract to embrace only oil produced and sold by you prior to the date of completion of your Bernard No. 2 well because oil produced thereafter belongs to me under the agreement and I shall make payment of all severance taxes and royalties due thereon.

In addition to the applicable purchase price as fixed and determined by the contract, I shall also pay you the actual cost incurred by you in the drilling of your Bernard No. 2 well which was not a producer, having

been drilled into the salt. Your attorney, Judge Wm. Bonner, has heretofore been requested to furnish us your statement of such cost but has not done so:

It is our insistence that the purchase price under the contract is \$300,000.00 for the reason the actual average daily production of my Bernard No. 3 well is and has been less than 3000 barrels on a 3/8 inch choke, calculated according to the methods usually employed in gauging the capacity of oil wells and as fixed by the contract. It is conceded by E. O. Buck, the engineer appointed by you to make a test of the capacity of the well, that it is unable to produce as much as 3000 barrels per day on a 3/8 inch choke, but nevertheless you have heretofore advised me that you are claiming the applicable purchase price under the contract is \$400,000.00. I deny your right so to claim.

It would be a burdensome hardship for me to pay you at the time stated in the contract \$200,000.00 representing the cash payment of 50% of the maximum price you are demanding rather than \$150,000.00 which is the true and correct amount due as fixed and determined by the agreement. However, under Paragraph #5 of the contract my failure to exercise the applicable option would cause me to lose all rights under the agreement, and 190 the Bernard No. 3 well which you claim has a capacity of more than 3000 barrels per day would become your sole property. Your contention is without merit or foundation but as you have indicated a desire to litigate, and I am anxious to develop the property by drilling additional wells which would be impossible should you throw the matter into litigation thereby causing me untold monetary loss and expense, in order to protect my rights and minimize my damages you are advised that this exercise of the options granted by the contract of February 6th, 1935, is to be construed as applying to the proper applicable purchase price as therein determined whether it be \$300,000.00 or \$400,000.00, and at the time fixed by the agreement, I will pay you in cash 50% of said price of \$400,000.00 which

you notified me you demand and will also pay and discharge at the same time any other obligations undertaken by me in said contract, all with full reservation, however, of any and all rights which I have or may have under and by virtue of said agreement. Under any and all circumstances, this exercise of the aforesaid applicable option is absolute and unconditional with respect to the proper purchase price due thereunder.

Demand is hereby made upon you to deliver to me in accordance with the contract the duly executed deed attached to the contract of February 6th, 1935, and marked "Exhibit A" for identification therewith, and upon your failure or refusal so to do I will enforce strictly my rights under the agreement and hold you responsible for all loss or damage which I may sustain in the premises.

Very truly yours,

.....

EXHIBIT MARKED "D-35," BEING COPY OF LETTER
DATED MAY 8, 1935, FROM TO
WILLIAM N. BONNER.

191

Filed Feb. 26, 1937.

May 8th, 1935.

File No. 3438.

William N. Bonner, Esquire,
Attorney at Law,
Sterling Building,
Houston, Texas.

Dear Sir:

Your letter of May 6th relative to Judge C. E. Hardin has been received.

I bitterly resent the implications therein contained that we are endeavoring to win a law suit by besmirching

the character of a fellow attorney. Our consistent policy in life as exemplified by our record at the Bar will disclose that we have always met every issue on its merits and without resort to personalities. In this instance we felt and feel now that Judge Hardin's conduct was so essentially improper as to jeopardize our client's interests and compel our protest. The record which has been built up speaks for itself and I adhere to my position that as Judge Hardin undertook to act in a capacity purely judicial in character he automatically disqualified himself from appointing an engineer to act as umpire after you had already disclosed questions of law pertaining to the case with him and he himself entertained the distinct hope of being employed, if he was not actually employed. Our convictions in this respect are redoubled and reaffirmed by his appointment of Mr. Massey whom you suggested to him and whose report was made directly to you, our first knowledge of the contents thereof being what you told me over the telephone Monday last and as confirmed by a copy of the report which you enclosed with your special delivery letter received last night after our client had been compelled to exercise his option without having the benefit of Mr. Massey's report.

192 With reference to your argument about the meaning of the contract, our position is that the contract speaks for itself and I am unable to agree with your conclusion that it contemplates the making of a wild guess by an engineer notwithstanding the express language of the agreement providing for a fixed and absolute standard of accurate mathematical determination of the capacity of the well.

You are quite incorrect in making the statement that my client did not expect the third engineer to be named from Louisiana because his political connections might influence the umpire. Mr. Helis is a Greek, who has been living in Louisiana only a short while and is not even a qualified voter here. He never made any such statement in my presence and this matter was never discussed out of my presence. We did state that we would

have no objection to your acting as umpire under the terms of the contract. However, this was before we knew that your clients would attempt to repudiate an honest agreement on grounds which appear to us ridiculous in view of the express language of the contract which you analyzed at quite some length, including the memorandum, before advising your clients to sign.

With reference to the manner of making tests, our position from the outset has been and is now that the appointment of an engineer to act as umpire was unnecessary because it was and is admitted by all parties that the average daily production of the well on a 3/8 inch choke is not in excess of 3000 barrels.

With reference to the circumstances under which Judge Hardin came to Houston, I am still at a loss to understand why he gave up so much of his time in connection with the appointment of an engineer without compensation, which I offered, and at the same time insisting that we agree to pay the bill of the engineer to be designated by him.

With reference to the discussion about venue, please be reminded that I had left your office and was walking down the hall when, as I realize it now, to allay my natural suspicions you asked my opinion about venue, although Judge Hardin was still in your office, and you admit you had discussed the matter with him. I very frankly told you that we felt our position was so certain that there would never be any litigation. You are quite incorrect in stating that I told you "the entire affair would be closed up to my (your) satisfaction."

I am quite frank to say that I did object to the appointment by Judge Hardin, on the very day of my unexpected conference with him, of an engineer and I did request him to defer the matter until the following day. I did talk to engineers in Houston but as the question at issue is controverted, I did not feel at liberty to suggest their use in a judicial capacity nor would I, and I was unable to learn of anyone free to act. It was

Judge Hardin's responsibility, if he assumed it, to appoint an engineer free of all bias and I am quite surprised that even after we raised the question of his disqualification he nevertheless appointed an engineer of your own choosing and who made his report to you without notice to us, after it was hazardous for our client to delay longer in accepting the option.

With reference to your statement that I apologized to Judge Hardin for language used to him in your office, you are quite mistaken as you have been all along with reference to your statements and conclusions. When I walked into the conference in your office, not knowing that Judge Hardin was invited to be there by you, I felt, as I feel now, that I and my client were entitled to more consideration and consequently at all times during the conference I reserved all rights of my client under the contract. It was my repetition of this reservation of rights that caused Judge Hardin to become perturbed and I can well understand why in view of subsequent events. I am quite familiar with the axiom that "whom the Gods would destroy they first make mad" and only for this reason I did not leave the conference altogether. My duty to my client required me to ascertain the true situation.

With reference to your statement that I dictated the instructions to be given by Judge Hardin to the engineer, you are reminded that our discussion in this direction,

194 was as you admit, with full reservation of all my client's rights, protesting at all times the propriety of the appointment, and now we re-iterate the protest on this ground and on the additional ground that the engineer did not carry out the instructions. From what has been done it is obvious that you and Judge Hardin would have appointed an engineer anyway so we thought that "with reservation of our client's rights" we should protect him as much as possible.

As you are reconciled to extended litigation, we will have ample opportunity to determine the propriety of the appointment of the umpire which we claim is null

and void because Judge Hardin had previously disqualified himself from acting and your letter confirms my previous convictions that Judge Hardin, as a result of your actions and conversations with him, had at all times justifiable reason to believe, as he so told me, that his firm would be employed as counsel for your clients in this litigation should it develop into a law suit.

If you think I am going to apologize to Judge Hardin or to you or to anybody else for what has occurred, you are quite mistaken. Both of you owe me and my client an apology and we will be glad to submit the issue at any time. All my client and I expect is a square deal and we propose to get it.

Very truly yours,

LJC:N.

EXHIBIT MARKED "D-36," BEING COPY OF LETTER
DATED MAY 8, 1935, FROM COBB & JONES TO
WILLIAM N. BONNER.

195

Filed Feb. 26, 1937.

May 8th, 1935.

File No. 3438.

William N. Bonner, Esquire,
Attorney at Law,
Sterling Building,
Houston, Texas.

Dear Sir:

Your letter of May 6th advising of the dissolution of Iberia Oil Corporation during the past week was received by special delivery last night at 9:00 P. M. and after notice by registered mail had been directed to your clients with respect to the exercise by Mr. Helis of his option under the contract of February 6, 1935.

In another letter in the same mail you state that our respective clients "will probably have extended litigation in this matter" and I assume therefrom that the dissolution is intended to deprive the State Court of jurisdiction and litigate in the Federal Court. We have implicit confidence in the integrity of our Courts whether Federal or State and will submit the issue with confidence to any proper tribunal.

With reference to your threat to notify J. S. Abercrombie not to permit to be delivered to Mr. Helis any more oil through his pipeline until our client has "paid \$200,000.00 cash and cooperated in filling the blank in the conveyance with \$200,000.00 to be paid from oil," you are advised that the contract speaks for itself and that if your clients do any act or thing to interfere with our rights thereunder, we will hold you strictly accountable for any loss occasioned thereby.

Heretofore we have suggested that your clients
196 keep a representative on the leased premises to check the amount of oil being produced but you have failed to do so. We have also requested you to make a disposition of the oil which you told me you were unable to do and have not done. As our client has exercised his option, there is no necessity for us to furnish you with the cost of his Bernard No. 3 well and we desire a full and complete itemized statement showing the cost to your clients of the Bernard No. 2 well. We also reiterate our previous demand that you advise us when the last work on the No. 2 well was done, for under the contract we are entitled to all oil produced from all wells from the date of the actual completion of the No. 2 well.

Very truly yours,
COBB & JONES,

By
r

LJC:N.

EXHIBIT MADE PART OF ORIGINAL PETITION BE-
ING LETTER DATED HOUSTON, TEXAS, APRIL
29, 1935, FROM E. O. BUCK TO WM. BONNER, TO-
GETHER WITH REPORT AND CHARTS AT-
TACHED.

196a

Filed Dec. 11, 1935.

Houston, Texas, April 29, 1935.

Mr. Wm. N. Bonner,
Sterling Building,
Houston, Texas.

Dear Sir:

In agreement with you and Mr. Alexander Deussen on the testing of the well known as Lincoln Production Company-No. 3, Broussard in the Little Bayou field, Iberia Parish, La., I conducted these tests on April 27th and 28th.

I met Mr. A. L. Mitchell and Mr. Y. D. Spell in New Iberia and went to the lease the morning of the 27th, where I found the No. 3 well (the one in question) and the No. 1 well producing into the same gun barrel and tank battery.

It was necessary to rearrange the connections to separate the production from these two wells before an accurate gauge could be made.

At this time the No. 3 well was producing through a 3/8" positive choke on one wing of the Christmas Tree and a 1/4" positive choke on the other wing, at an estimated rate of flow of 1400 barrels per day.

When the changes were made I learned the Lincoln people did not want the well produced through a choke larger than a 3/8", and would not permit the installation of an adjustable choke on either wing of the tree.

Mr. Frank Brasher, who seemed to be in charge of the Lincoln operations for the field, and Mr. Smith, who I understand is the broker for this proposed trade, were both willing for the well to be tested, but were reluctant

to allow the flow to go above a 3/8" choke, in spite of the fact that the well was producing through a 3/8" and a 1/4" choke when I arrived.

There was no engineer representing the Lincoln people while these tests were in progress, but I understood that Mr. Smith or Mr. Brasher could witness my work, and that the Lincoln people would be satisfied with the results.

Shortly after the tests were begun Mr. Smith left and turned his part of the witnessing of the procedure over to Mr. Brown, who is the afternoon gang foreman for the Lincoln people.

Mr. Brown witnessed all of the tests that I conducted on the 27th.

On the 28th the morning tour gang pusher witnessed the tests that I conducted.

The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a 5/8" choke. However, I was unable to produce the well through this size orifice, because Mr. Brasher and Mr. Smith were not available and had left instructions with their field men not to produce the well through a choke larger than 1/2".

A detailed summary of the report and a chart showing the productivity of the well through various size chokes is enclosed.

I beg to remain,

Yours very truly,

(Signed)

E. O. BUCK.

196b Report attached to foregoing letter from
E. O. Buck.

It has been the history of all salt dome production that sudden or abrupt changes in choke sizes have had harmful effect on producing wells.

The well in question had been produced through a 3/8" and a 1/4" choke for a period of approximately two days, and it was considered advisable to reduce the rate of flow by a 1/4" choke and allow the well to become steady on a 3/8" choke before further adjustments were made.

Inasmuch as the pressures recorded at the surface were remaining more or less constant it was desirable to determine if this well was capable of producing approximately the same amount of oil through the same choke size at different flow periods.

The first gauge taken was on a 3/8" choke and the choke size reduced 1/8 of an inch at a time until the choke size had been reduced to 1/8 of an inch.

The process was reversed, increasing the size of the choke 1/8 of an inch at a time until the choke size was 1/2". In following these various steps attention is called to the close proximity of production of the various flow periods when the same size choke was being used.

Attention is also called to the slight variation of pressure between the 1/8" choke and the 1/2" choke, showing that at no time during the test period was the well producing heavy enough to cause other than a slight variation in the pressure.

On a 3/8" positive choke for one hour, beginning at 1:09 P. M. April 27, 1935, the well produced 51.79 barrels during this hour.

The choke size was reduced to 1/4" and produced the following hour at the rate of 25.22 barrels.

The choke size was reduced to 1/8" and produced in one hour 6.65 barrels.

The 1/4" choke was again installed and the well produced in one hour 25.35 barrels.

The 3/8" choke was again installed and the following hour the well produced 50.48 barrels.

The 1/2" choke was installed and the well produced 95.85 barrels the first hour and 89.87 barrels the second hour.

The well was cut back to production of the $3/8$ " choke and the $1/4$ " choke until the following morning.

During this time the well was produced at the rate of 1300 barrels per day.

The $1/2$ " choke was again installed at 11.38 A. M. April 28, 1935, and the well produced 92.96 barrels in the next hour. The following hour the well produced through a $1/2$ " choke and a $1/4$ " choke at the rate of 100.94 barrels per hour.

The area outlet of a $1/4$ " choke plus a $1/2$ " choke is approximately equivalent to one $9/16$ " choke, but the production from these two chokes in comparison with the production from a $9/16$ " choke will not be the same, because of the differential of pressure between the two smaller chokes being considerably greater than that same differential of pressure across the face of a $9/16$ " choke, and if the well had been produced through a $9/16$ " choke the production would have reached an average of approximately 125 barrels per hour, or the equivalent of 3000 barrels per day.

196c Chart Annexed to Letter From E. O. Buck.

April 27, 1935.

Choke Size	Time	Tank No.	Gauge Ft. In.	Production	Tubing Pressure
$3/8$ "	1:09 P. M.	1	7' 4"		
	2:09 P. M.	1	8' $13/4$ "	51.79 Bbls.	610 lbs.
$1/4$ "	2:35 P. M.	1	8' $5 1/2$ "		
	3:35 P. M.	1	8' $10 1/4$ "	25.22 Bbls.	625 lbs.
$1/8$ "	3:48 P. M.	1	8' $11 1/4$ "		
	4:48 P. M.	1	9' $.0 1/4$ "	6.65 Bbls.	625 lbs.
$1/4$ "	5:08 P. M.	1	9' $.0 3/4$ "		
	6:08 P. M.	1	9' $5 1/2$ "	25.35 Bbls.	625 lbs.
$3/8$ "	6:31 P. M.	1	9' $7 3/4$ "		

April 28, 1935.

Choke Size	Time	Tank No.	Gauge Ft. In.	Production	Tubing Pressure
	7:31 P. M.	1	10' 5 1/4"	50.48 Bbls.	600 lbs.
1/2"	8:10 P. M.	1	10' 11"		
	9:10 P. M.	1	12' 3 1/2"	95.85 Bbls.*	575 lbs.
	10:10 P. M.	1	13' 7 1/2"	89.87 Bbls.*	585 lbs.
1/2"	11:38 A. M.	1	2' 1"		
	12:38 P. M.	1	3' 6 1/2"	92.96 Bbls.	575 lbs.
1/2" & 1/4"	12:54 P. M.	1	3' 11"		
	1:54 P. M.	1	5' 6"	100.94 Bbls.	535 lbs.

*The well was flowing into a gun barrel then into tank #1. The increased rate of flow caused a rise in the fluid head of the gun barrel of 3 inches or 8.2 barrels the first hour and 1 1/2 additional inches the second hour or 4.87 barrels.

EXHIBIT MADE PART OF ORIGINAL PETITION,
BEING LETTER OF MAY 6, 1935, FROM W. L.
MASSEY TO WM. HELIS AND MESSRS. MIT-
CHELL, WARD, MHOON AND SPELL.

196d

Filed Dec. 11, 1935.

Houston, Texas, May 6, 1935.

Mr. Wm. Helis,
New Orleans, Louisiana.

Messrs. A. L. Mitchell, Bryan Ward,
L. B. Mhoon and Y. D. Spell,
Houston, Texas.

Gentlemen:

Pursuant to my appointment as umpire to determine
the capacity of the Bernard #3 well on the Bernard lease

in New Iberia Parish, Louisiana, I proceeded to that place on Saturday, May 4th, and with Mr. E. O. Buck, representing the second parties above named, interviewed Mr. Brashear at the hotel at New Iberia. Mr. Brashear said that he did not care to go with us personally to the well at that time, but that Mr. Smith another representative of Mr. Helis would probably be present, and that Mr. Buck and I were at liberty to proceed to test the well.

Mr. Buck, Mr. Smith, and I conducted various tests on this well, the last of which was Sunday afternoon, and as a result of said tests I find that said Bernard #3 well is capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a $\frac{3}{8}$ " choke.

Understanding my instructions from Judge Hardin to be that I also find the producing capacity of the well on a $\frac{3}{8}$ " choke, I find that the well will not make 3,000 barrels per day on such $\frac{3}{8}$ " choke.

To determine the correct physical condition of the well on a $\frac{3}{8}$ " choke, I conducted tests through $\frac{1}{4}$ " choke, $\frac{3}{8}$ " choke, $\frac{1}{2}$ " choke, and for a few moments on a $\frac{5}{8}$ " choke. It was my desire to conduct the usual one-hour test on a $\frac{5}{8}$ " choke and perhaps on a $11/16$ " choke (with the latter which the well would have actually flowed at a rate in excess of 3000 barrels per day) but the persons present at the well, Messrs. Smith and Bailey, who I understand to be representatives of Mr. Helis, seriously objected and refused to permit any such, and in fact did not wish any test made on any choke larger than a $\frac{3}{8}$ " choke, but did consent for a very short test, merely to determine pressure drop, as high as $\frac{5}{8}$ " which test was not longer than five minutes in duration.

The pressures encountered under these various tests and the results observed and obtained have been reduced to writing (engineer's calculation) and copies are attached hereto. Photostatic copy of a graph prepared by me is also attached, which illustrates certain portions

of the work performed at the well and which is self-explanatory.

Very truly yours,
(Signed) W. L. MASSEY.

The undersigned, E. O. Buck, concurs in and adopts the foregoing as his final report in the matter to be construed in connection with his original report, before the appointment of an umpire.

E. O. BUCK.

Exhibit annexed to original Petition, filed December 11, 1935.

ACTUAL PRODUCTION FOR VARIOUS CHOKE SIZES, WITH VELOCITY OF FLUID CALCULATED FOR DECREASES IN PRESSURE.

$$V = \frac{Q}{\frac{\pi(d)^2}{4}}$$

Where: V = Velocity of fluid.
Q = Quantity of fluid per hour.
d = Diameter of choke

1/4" Choke 26.59 B. P. H. 0640# Pres.

$$V = \frac{Q}{\frac{\pi(d)^2}{4}} = \frac{26.59}{\frac{\pi(.25)^2}{4}} = 504$$

3/8" Choke 53.12 B. H. P. 0625# Pres.

$$V = \frac{Q}{\frac{\pi(d)^2}{4}} = \frac{53.12}{\frac{\pi(.375)^2}{4}} = 500$$

1/2" Choke 90.48 B. P. H. 0575# Pres.

$$V = \frac{Q}{\frac{\pi(d)^2}{4}} = \frac{90.48}{\frac{\pi(.5)^2}{4}} = 460$$

Velocity of fluid on 5/8" choke based on pressure drop. Solve for

$$V = \frac{Q}{\frac{\pi(d)^2}{4}}, Q = V \times \frac{\pi(d)^2}{4}$$

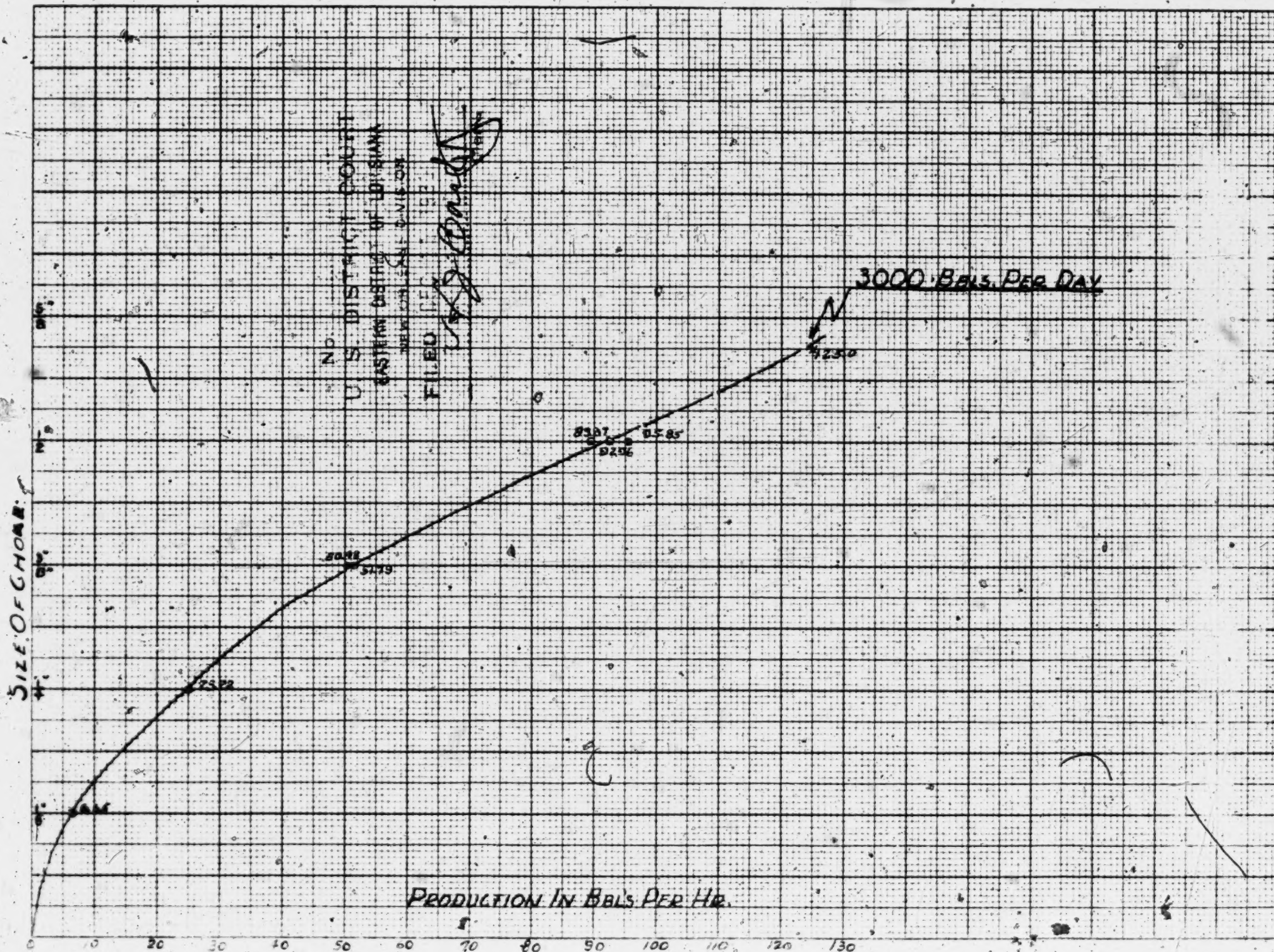
V Calculated to be 372.5 0505#

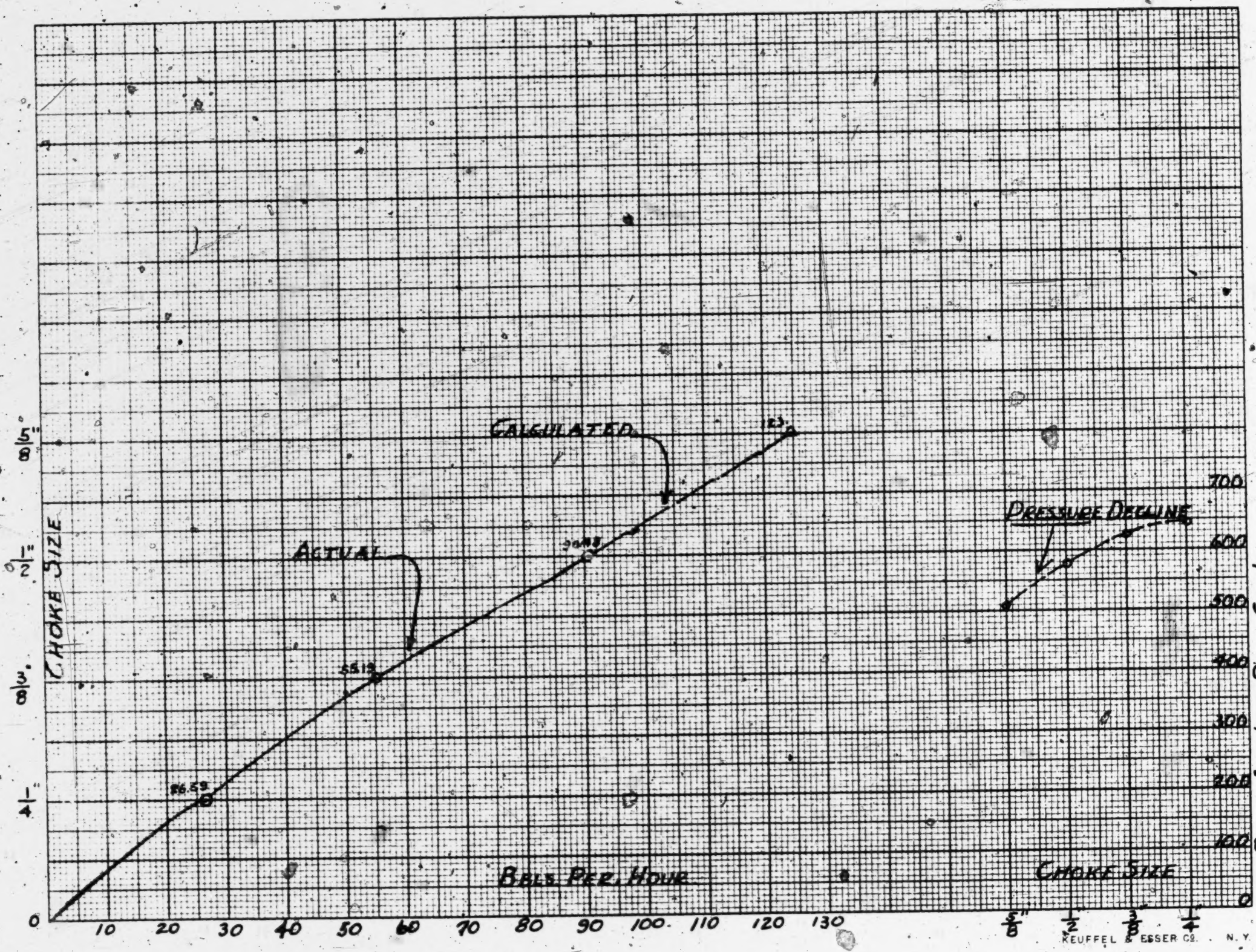
$$Q = 372.5 \times \frac{\pi(.625)^2}{4} = 123 \text{ B. H.}$$

1961 FLOW TEST OF IBERIA OIL CO. BERNARD
#3, IBERIA PARISH, LA.

May 5, 1935.

Choke	Time	Rate of Flow	Pressure	Trap Pressure
Choke	Time	Rate of Flow	Pressure	Trap Pressure
1/4"	10:52	26.59	640	20
	11:52			
3/8"	8:14	58.99	623	20
	9:14	53.12		
	10:14			
1/2"	12:12	91.97	575	20
	1:12	89.0		
	2:12			
5/8"	2:30	0	505	20
	2:35			





PRES. IN LBS. PER. SQ. IN.

PETITION FOR APPEAL AND ORDER ALLOWING
SAME.

197

Filed Nov. 29, 1937.

(Number and Title Omitted.)

To the Honorable Wayne G. Borah, Judge of the Eastern
District of Louisiana:

The petition of Mrs. Itasca Kinney Ward, as Executrix
of the Estate of Bryan Ward, deceased, A. L. Mitchell,
L. B. Mhoon and Y. D. Spell, respectfully show:

I.

The petitioners are complainants in the above entitled
cause, and Bryan Ward, an original complainant, having
died pending the suit, is represented in these proceedings
by his widow and Independent Executrix Itasca Kinney
Ward.

II.

That a final decree was entered in the above cause
against petitioners in favor of the defendant William Helis
on the 27th day of September, 1937, dismissing with
prejudice the Bill of Complaint, and awarding to the
said defendant costs of the proceeding. Said decree is
recorded in the Minutes of this Court.

III.

That petitioners are aggrieved by said decree; that the
same is contrary to the law and the evidence and without
support in either; and that petitioners desire to appeal
therefrom to the Honorable United States Circuit Court
of Appeals for the Fifth Circuit, at New Orleans.

IV.

In connection with this petition, petitioners here present their Assignment of Errors, making same by reference a part of this petition and filed herewith.

Wherefore, petitioners pray that an appeal may be allowed to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, and that a
198 transcript of the record proceedings and papers upon which said decree was made, and duly authenticated, may be sent to the said Circuit Court of Appeals; and petitioners further pray that an order be made, fixing the amount of the security which they ought to give for the purpose of effecting and prosecuting their appeal. Petitioners pray for service and citation upon the defendant, or his authorized solicitor of record, Hon. Lloyd J. Cobb, who resides in the City of New Orleans, Louisiana. And they pray for such other relief as this petition may merit.

WM. N. BONNER,
Of Houston, Texas,
W. D. GORDON,
Of Beaumont, Texas,
Solicitors for Petitioner.

TERRIBERRY, YOUNG, RAULT & CARROLL,
Of New Orleans,
Of Counsel.

ORDER.

After considering the foregoing petition and attached Assignment of Errors, and the acceptance of service thereon by the defendant, the foregoing application for appeal is hereby granted and allowed to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, returnable according to law, upon the petitioners

giving bond according to law and conditioned as the law directs, in the sum of \$250.00.

New Orleans, Louisiana, this 29 day of November,
A. D. 1937.

(Signed) **WAYNE G. BORAH,**
District Judge.

Nov. 29/37.

Service accepted. All rights reserved.
(Sgd.) **COBB & SAUNDERS,**
Attys. for Wm. Helis.

199

ASSIGNMENTS OF ERROR.

Filed Nov. 29, 1937.

(Number and Title Omitted.)

Come now Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, deceased; L. B. Mhoon, A. L. Mitchell, and Y. D. Spell, complainants in the above numbered and entitled cause, and in connection with, and as a part of, their petition for appeal herein, file the following Assignments of Error upon which they will rely in the prosecution of their appeal herewith petitioned for in said cause:

1. It was error in the Court in construing the contract in controversy to refuse to award to the complainants, under the undisputed evidence, the maximum price of \$400,000.00 for the property so contracted to be pur-

chased by the defendant from complainants, and in accordingly dismissing their bill.

2. In arriving at the capacity of the well named in said contract, the Court committed error in holding that the contract determining the capacity of Well No. 2 for a period of fifteen (15) days after completion, "calculated on a 3/8 inch choke, according to the methods usually employed in gauging the capacity of oil wells," meant that said well for said period of fifteen days had to produce, through a 3/8 inch choke, more than three thousand barrels per day, and, accordingly, by so construing the contract as to such test, the Court committed error in holding that said well was thus incapable of producing more than three thousand barrels per day "calculated as above set forth," and that therefore the complainants were not entitled to the purchase price stipulated in the contract to be \$400,000.00.

3. The evidence being undisputed that the capacity of said well for said period of time was actually greatly in excess of three thousand barrels per day, and actually produced in the hands of the defendant, by natural flow, an amount of oil greatly in excess of three thousand barrels per day; consistently for many months after it was brought in; and the evidence being undisputed that no well has ever been known to actually produce through a 3/8-inch choke as much as three thousand barrels per day, even though having an actual capacity to produce many times that amount, it was error in the Court to construe said terms of said contract to mean that said well was required to produce such impossible quantity through such 3/8-inch choke or opening, and to hold that such facts had no legal significance, and that "if the parties unwittingly contracted for a premium or bonus on the happening of an impossible condition, the provision of the contract, with reference thereto, is of no legal consequence"; and in

accordingly adjudging the case not as to the actual capacity of the well, calculated upon a standard and customary method of 3/8-inch choke, but in holding the meaning of such contract to be that the well was required to produce an impossible quantity through such small opening, the Court committed manifest error against the complainants.

4. It was error for the Court to hold that the defendant was not estopped by his acts and conduct, as specifically set up in the third division of their amended bill, which allegations of fact were supported by the undisputed proofs, and in not awarding a decree to them based upon such pleading and evidence.

5. It was error for the Court, under the undisputed facts, not to award to the complainants a rescission of their contract, as pleaded by them, and to restore the possession of their property so contracted to the defendant and surreptitiously acquired by him in securing from the Bank by payment of the \$400,000.00 consideration as provided in the contract and immediately seizing the funds upon the Bank's releasing complainants' deed to him, which he recorded in the Parish Records of Iberia Parish, and under which he seized the possession and claim of the complainant's property, and from which he has run and appropriated in a period of 22 months immediately thereafter, approximately two million barrels of oil up to December, 1936. Complainants, in the original and amended Bill, asked an accounting and
201 for an appropriate decree based on such right of rescission, and the Court erred in denying same.

6. And in the event the complainants were not entitled to rescind said transaction as stated in the next preceding specification of error, the Court erroneously

refused to award them specific performance of their contract, based upon the valuation of \$400,000.00 for said property, it being established by the undisputed proof that said well was capable of producing, and did actually produce, oil for a long period of time greatly in excess of three thousand barrels per day. And in any event, pursuant to the Court's construction of said contract, the decree dismissing complainant's cause has erroneously refused to award to the complainants, other than Y. D. Spell, the balance of the purchase price, viz, \$36,666.66, concededly due them by the defendant.

7. The Court erred in finding that defendant, Wm. Helis, did not agree to or participate in the first test of the well, since the uncontradicted evidence is that he wired his approval of the plan and agreed to have his agent present and his agents were present, in the persons of Brashears, Smith and the lease men, and participated therein.

8. The Court erred in finding that defendant, Wm. Helis, refused to join in any request for a third party or umpire, because the uncontradicted evidence is that he expressly requested Judge Hardin to appoint a competent umpire to make the second or final test.

9. The Court erred in failing to find that Wm. Helis is now estopped to question the fact that the well will actually produce more than three thousand barrels by reference to the amount which the well flowed when restricted to a 3/8-inch choke.

10. The Court erred in failing to find that Wm. Helis is bound by the report of the engineers, Buck and Massie, because, in addition to cooperating in the two test, said Helis did not at any time request additional or different tests or complain of the way in which either test was made.

202 Wherefore, complainants pray that the said decree may be reversed and that the relief prayed for by the complainants be awarded to them in such manner as to the Court may seem just and proper.

WM. N. BONNER,

W. D. GORDON,

Solicitors for Complainants.

TERRIBERRY, YOUNG, RAULT & CARROLL,
Of Counsel.

203

APPEAL BOND.

Filed Nov. 29, 1937.

(Number and Title Omitted.)

Know all Men by these Presents: That we, Mrs. Itasca Ward, Executrix of the Estate of Bryan Ward, deceased, A. B. Mhoon, A. L. Mitchell, and Y. D. Spell, as principals, and National Surety Corporation, as surety, are held and firmly bound unto the above named William Helis, in the sum of Two Hundred and Fifty Dollars; to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, and assigns, respectively, firmly by these presents:

Sealed with our seals and dated this 26th day of November, 1937.

Whereas, Mrs. Itasca Ward, Executrix of the Estate of Bryan Ward, deceased, A. B. Mhoon, A. L. Mitchell, and Y. D. Spell, complainants, have prosecuted their appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the decree entered in said cause, by the United States District Court for the Eastern District of Louisiana, on the day of, 1937, denying complainants the relief sought against the said William Helis.

Now, Therefore, the condition of this obligation is such, that if the above named complainants, Mrs. Itasca

Ward, Executrix of the Estate of Bryan Ward, deceased, A. B. Mhoon, A. L. Mitchell, and Y. D. Spell, shall prosecute their appeal to effect and answer all costs if they fail to make good their plea, then this obligation to be void, otherwise in full force and virtue.

(Sgd.) **MRS. ITASCA WARD,**
Executrix of Estate of Bryan
Ward, Dec'd,

(Sgd.) **A. L. MITCHELL,**

(Sgd.) **A. B. MHOON,**

(Sgd.) **Y. D. SPELL,**

By **WM. N. BONNER &
W. D. GORDON,**

(Sgd.) His attys. of record, Principals.
NATIONAL SURETY CORPORATION,

By **E. R. BARROW,**
(Seal) Attorney-in-fact, Sureties.

Countersigned at New Orleans, La.

(Sgd.) By **LOUIS COIRON.**

204 The State of Texas,
County of Harris.

On this 26th day of November, A. D. 1937, before me, the undersigned, a Notary Public within and for said county and state, personally appeared Mrs. Itasca Ward, Executrix of Estate of Bryan Ward, Dec'd., A. L. Mitchell and A. B. Mhoon, known to me to be the persons who are described in and who executed the foregoing instrument and acknowledged to me that they executed the same.

(Sgd.) **AILEEN ALVERSON.** (Seal)

The State of Texas,
County of Harris.

Wm. N. Bonner, being sworn, states that he and W. D. Gordon are attorneys of record for all appellants herein, including Y. D. Spell; that affiant as such attorney is

authorized to and does affix the name of Y. D. Spell to the foregoing bond, which has been personally signed by the other appellants, Mrs. Itasca Ward, A. L. Mitchell and A. B. Mhoun, in his presence; and that he is advised that at this time Y. D. Spell is absent from the State of Texas.

(Sgd.) WM. N. BONNER.

Subscribed and sworn to before me by Wm. N. Bonner this 26th day of November, 1937.

(Sgd.) AILEEN ALVERSON,

(Seal) Notary Public, Harris County,
Texas.

The State of Louisiana,
Parish of Orleans.

....., a surety on the annexed bond, being duly sworn, deposes and says that he is a resident of and freeholder in said District of Louisiana, that he is worth at least the sum of \$..... over and above his just debts and liabilities, in property subject to execution and sale, and that his property consists of located at

.....
Surety.

Subscribed and sworn to before me this day of November, 1937.

.....
Notary Public, Orleans Parish,
Louisiana.

205

Subscribed and sworn to before me, the undersigned, this day of November, 1937.

.....
Notary Public, Orleans Parish, La.

Approved:

(Sgd.)

WAYNE G. BORAH,

Judge, District Court of the U. S.,
Eastern District of Louisiana,
at New Orleans.

PRAECIPE FOR TRANSCRIPT.

Filed Dec. 23, 1937.

(Number and Title Omitted.)

To H. J. Carter, Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, pursuant to an appeal allowed in the above entitled and numbered cause, and to include in such transcript of record the following, and no other:

- (1) Caption.
- (2) Transcript of Removal from Civil District Court, Parish of Orleans, including plaintiff's original petition and exhibits.
- (3) Joint answer and cross-bill of defendants.
- (4) Order overruling defendants' motion to dismiss.
- (5) Joint motion of plaintiff and defendant, Y. D. Spell, and order that National Bank of Commerce in New Orleans pay Spell one-third of fund under seizure.
- (6) Motion of plaintiff and order dismissing bill without prejudice.
- (7) Motion of plaintiff to dismiss cross-bill and order overruling.
- (8) Answer of William Helis to cross-bill.
- (9) Hearing of case and submission.
- (10) Motion and order that Mrs. Itasca Ward, Executrix, be made party plaintiff.

(11) Findings of Fact and Conclusions of Law.

(12) Judgment.

(13) Narrative Statement of Evidence.

(14) Exhibits:

(a) Exhibits introduced by cross-plaintiffs numbered 1 to 18, inclusive.

(b) Exhibits introduced by petitioner, Wm. Helis, numbered D-1 to D-36, inclusive (except D-15, D-16, D-20, D-21, D-22, D-23, D-30 and D-26, which are the same, respectively, as Cross-plaintiffs' Exhibits Nos. 7, 7a, 8, 9, 11a, 11, 13 and 12).

(15) Minute entry of Judgment.

207 (16) Petition for appeal and order allowing same.

(17) Assignments of Error.

(18) Appeal Bond.

(19) This Praeceptum.

(20) Your Certificate.

Very truly yours,

(Sgd.)

W. D. GORDON,

(Sgd.)

WM. N. BONNER,

Attorneys for Cross-Plaintiffs.

(Sgd.)

TERRIBERRY, YOUNG, RAULT
& CARROLL,

Of Counsel.

Copy of the foregoing received this 23 day of December, 1937, and further notice and service thereof are waived, the narrative statement of the evidence having been examined and approved by written stipulation of petitioner and cross-plaintiffs, and having been submitted to the Judge for order of approval, petitioner joins in the request of cross-plaintiffs in the foregoing praecipe and adopts same as his own.

(Sgd.)

COBB & SAUNDERS,
Attorneys for Petitioner,
Wm. Helis.

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Clerk's Office.

I, HENRY J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 207 pages contain and form a full, true and complete transcript of the record, assignment of errors and all proceedings in the cause entitled "William Helis vs. Bryan Ward, et als," No. 292 In Equity of the Docket of this Court, as made up in accordance with praecipe for transcript copied therein.

Witness My Hand and the seal of the said Court at the City of New Orleans, Louisiana this 15th day of February, 1938.

(Seal) H. J. CARTER, Clerk,
By H. W. NIEHUES, Deputy Clerk.

[fol. 228] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 1st, 1939

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al.,

versus

WILLIAM HELIS

On this day this cause was called, and, after argument by Wm. N. Bonner, Esq., and W. D. Gordon, Esq., for appellants, and Lloyd J. Cobb, Esq., for appellee, was submitted to the Court.

[fol. 229] OPINION OF THE COURT AND DISSENTING OPINION
OF SIBLEY, CIRCUIT JUDGE—Filed March 24, 1939

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al., Appellants,

versus

WILLIAM HELIS, Appellee

Appeal from the District Court of the United States for the
Eastern District of Louisiana

(March 24, 1939)

Before Sibley, Holmes and McCord, Circuit Judges

McCord, Circuit Judge:

In the year 1935 the Iberia Oil Corporation and Y. D. Spell owned a seven-eighths working interest in a mineral lease

covering sixty acres of land in the Little Bayou Oil Field in Iberia Parish, Louisiana. On February 6, 1935 the oil company and Spell entered into a written option agreement with William Helis whereby the said Helis was given the right to purchase their interest in the mineral lease. The option contract was prepared jointly by the contracting parties and [fol. 230] their respective counsel in the office of the seller. A day and the greater part of a night was consumed in drafting the agreement and much was written and said by the parties and many changes were made before the contract was finally agreed upon and signed.

At the time of the execution of the option contract Iberia Oil Corporation and Y. D. Spell had a producing oil well on their property. This well was known as Bernard No. 1. They were also engaged in drilling another well known as Bernard No. 2. Under the terms of the option agreement Helis agreed to drill at his own expense a third well on the property to be known as the Bernard No. 3.

The price which Helis agreed to pay for the mineral lease, in the event he exercised his right to purchase, was to be in accordance with the following provisions of the said contract:

"3. At any time prior to the expiration of the options herein granted, Second Party (Helis) shall have the right to purchase the afore-described mineral lease and all rights thereunder, including all oil produced from the Bernard No. 1 well from the date of completion of the Bernard No. 2 well, as follows:

"(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the capacity of oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production (producing) more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

[fol. 231] "The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of $\frac{1}{4}$ th of $\frac{7}{8}$ ths of the proceeds derived from the

production from all wells drilled and hereafter drilled on the said property.

“5. Within two days after the expiration of the test period of fifteen days following the completion of the Bernard No. 3 well drilled by Second Party, said Second Party shall elect to accept or reject the applicable option to purchase herein granted, and such acceptance or rejection shall be by registered mail addressed to Iberia Oil Corporation, Inc., at 1706 Sterling Building, Houston, Texas, and Y. D. Spell, 2215 Blanchette Street, at Beaumont, Texas. Failure of Second Party to give the required notice shall be deemed to be a rejection of the options granted, and Second Party shall have no further rights hereunder, and said Bernard No. 3 well shall become the sole property, of First Parties.”

The evidence discloses that after the option contract was signed, the parties and their counsel, after discussion, drafted jointly and the parties signed the following addendum contract:

“Houston, Texas, February 6, 1935. It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden, of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire.”

Iberia Oil Corporation drilled Bernard No. 2 into a salt formation; it failed to produce oil and was abandoned as a dry well.

[fol. 232] Helis drilled Bernard No. 3 and on April 21, 1935, it was brought in as an oil producer. This well has proved to be one of the largest oil producing wells in Louisiana. From April 29, 1935, to December 31, 1936, 1,802,565.32 barrels of oil was taken from the lease and nearly all this amount was produced by the Bernard No. 3 well. For many months this well actually produced more than three thousand barrels of oil per day.

After Bernard No. 3 was brought in as a producer, Helis exercised his right under the option agreement and gave notice to the oil corporation and Spell that he elected to

purchase the property. Without a test being made the sellers contended the price to be \$400,000.00 and Helis contended it to be \$300,000.00. The oil corporation and Spell called for a test of the well as provided for under the addendum contract and Helis agreed to join in the test. When the time arrived for the test Helis failed and refused to carry out his agreement and the test was made alone by the sellers' representative, E. O. Buck, a consulting petroleum engineer.

On a further proposed test of the well Helis again declined to name a representative and, through his counsel, bitterly protested the naming of an umpire by Judge Hardin, contending that he was interested and prejudiced. The evidence shows that Judge Hardin was in no wise interested or prejudiced; that he was fair and forthright, and that he had even gone so far as to call upon Helis' counsel to suggest the name of an engineer who could and would act as umpire. Counsel failed to suggest an engineer. Judge Hardin carefully followed the instructions given him by counsel for Helis by instructing W. L. Massey, an expert petroleum engineer whom he had appointed as umpire, to determine "first, the actual production of three-eighths ($\frac{3}{8}$) choke; second, by using the three-eighths ($\frac{3}{8}$) choke you are to calculate the open flow capacity of the well".

[fol. 233] Although the engineer Buck had tested the well previously, he joined Massey and together they made a test of the well and gave to each of the contracting parties a detailed report of their findings. Not one word of criticism, so far as we are able to find, was leveled at the work and findings of these engineers. The evidence shows them to be efficient, accurate and thorough, and although they were handicapped by lack of cooperation and the actual interference of Helis' employees, they made a thorough test and detailed report of their findings. The report of Massey, which was concurred in by Buck, informs that, "I find that said Bernard No. 3 well is capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a $\frac{5}{8}$ " choke".

The sellers demanded that they should be paid \$400,000.00 for their property. Helis still insisted that the price should be \$300,000.00, but nevertheless, called upon the sellers for a deed and agreed to pay the higher amount, under protest and with reservation of his rights under the agreement. He

insisted further that in paying the larger amount it should apply to whichever price was actually due and payable.

The sellers thereupon forwarded to the Bank of Commerce in New Orleans an assignment of the mineral lease, together with two drafts, one for \$215,530.34 and another for \$1,918.90. The purchase price of the lease was payable 50 per cent in cash and the balance out of the oil to be produced. The draft for \$215,530.34 represented fifty per cent of the maximum purchase price plus other amounts claimed to be due as costs incurred in drilling the Bernard No. 2 well. This surplus amount and the draft for \$1,918.90 are not before us for consideration or decision.

On May 13, 1935, Helis paid the drafts, received and accepted the assignment of the lease and immediately recorded [fol. 234] the same in the conveyance records of Iberia Parish, Louisiana. Upon paying the money into the bank he immediately attached and seized the entire amount. He immediately instituted an attachment suit in the Civil District Court of the Parish of Orleans to recover the \$50,000.00 which he claimed to be the difference between what he considered the correct cash portion of the purchase price, namely, \$150,000.00, and the amount of \$200,000.00 which he actually tendered for the assignment deed. Later he went into court and released all the funds seized except the \$50,000.00. The attachment suit was thereafter removed to the Federal District Court and was later voluntarily dismissed by Helis.

The sellers, by leave of the court, amended their answer and the same was taken as a cross petition and the cause was thereby further maintained in the district court over the strenuous objection of Helis, the sellers becoming the petitioners.

The Iberia Oil Corporation was dissolved and on May 3, 1935, its two-thirds interest in the Bernard lease was purchased by A. L. Mitchell, Bryan Ward, and A. B. Mhoon, and its liability under the Helis contract was assumed by them. Bryan Ward died in 1937 and Mrs. Itasca Kinney Ward was named executrix of his will, and by order of the court she was made a party to this suit.

The suit in the court below was one finally heard on the petition of Ward, Mitchell, Mhoon, and Spell. The petitioners sought to have the contract abrogated and an accounting ordered, or, failing in this, they sought to recover the sum of \$100,000.00 as the balance owing on the sale con-

tract. On a hearing the court below, in equity without a jury, found the issues in favor of William Helis and dismissed the petition. The petitioners now bring their appeal to this court.

[fol. 235] Our decision must turn upon the following questions: (1) Is the purchase price of the property to be determined by the amount of oil that can be produced by the well in a day through a $\frac{3}{8}$ -inch choke? (2) Is the purchase price of the property to be determined by the amount of oil the well is capable of producing in a day?

The parties and their lawyers, we may conclude from the evidence, knew thoroughly the line of business in which they were engaged. Before the parties signed the purchase option agreement they spent hours going over the proposed terms of the contract. They made many changes before the agreement was finally approved and signed. Not being content with this agreement they came together again with their counsel on the same day and after more discussion they drafted and the parties signed an addendum contract.

There is nothing ambiguous or complicated about the contract and its meaning. To find out what the well could produce a fifteen day test was provided. This is the test: "The average daily production . . . calculated on a $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the *capacity* of oil wells" or, as said in the next paragraph of the contract, the amount the well was "*capable of producing*" calculated as above set forth; that is, "calculated on a $\frac{3}{8}$ -inch choke".

The parties to this agreement were not children. They were experienced oil men. They were reinforced by counsel. They knew the oil business from every angle and they knew that there was not in all Louisiana an oil well that would produce 3000 barrels of oil per day through a $\frac{3}{8}$ -inch choke. The contract was not to measure the production through a $\frac{3}{8}$ -inch choke, but to calculate on a $\frac{3}{8}$ -inch choke the amount the well was capable of producing.

A child could stand at the well and measure the amount [fol. 236] of oil that would come through a $\frac{3}{8}$ -inch choke in a day. The parties wanted more, they wanted to ascertain if the well was "*capable of producing*" more than 3000 barrels of oil per day. They provided a test to determine this capacity by calculation without subjecting the well to the hazards attendant to the open flow of a well. Much was staked on the agreement. A balance of many thousands

of dollars was to be paid from the oil that was to come from this land. If the oil was not produced the sellers would not be paid. The parties well knew that to allow the well to run on open flow would impair the life of the well and in all probability destroy it. Men skilled in the oil business do not permit wells to run on an open flow and these parties knew it. It is not to be presumed that these parties intended to do a vain and useless thing. *Clay v. Ballard*, 9 Rob. (La.) 308; 13 C. J. Sec. 511, p. 540.

Of course the $\frac{3}{8}$ -inch choke of itself would not disclose the capacity, but by using it as a base, and building up therefrom by using other chokes to determine pressures and conditions, expert petroleum engineers could calculate accurately the amount of oil the well was capable of producing in a day. This calculation could be made without releasing the entire flow of the well and thereby endangering its life. We have only to turn to the reports of the two petroleum engineers: "To determine the correct physical condition of the well on a $\frac{3}{8}$ " choke, I conducted tests through $\frac{1}{4}$ " choke, $\frac{3}{8}$ " choke, $\frac{1}{2}$ " choke, and for a few moments on a $\frac{5}{8}$ " choke." They find, to be sure, that the well would not produce over 3000 barrels of oil in a day through a $\frac{3}{8}$ -inch choke, but they tell us that by using the $\frac{3}{8}$ -inch choke and then building up therefrom, "I find that said Bernard No. 3 well is capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow, or through any choke larger than a $\frac{5}{8}$ " choke".

[fol. 237] To hold that the measure of oil passing through the $\frac{3}{8}$ -inch choke is the determining factor we must change the contract to read: "The average daily production . . . for a period of fifteen days . . . measured through a $\frac{3}{8}$ -inch choke". We must also cast away the provisions which call for the ascertainment of the amount the well is "*capable of producing, calculated as above set forth*".

The contracting parties knew how to measure oil flowing from wells. That was part of their business. No addendum clause was required for them to find out what oil would pass through a $\frac{3}{8}$ -inch choke in a day. This clause was put in for a real test to be made by experts in the event of a disagreement. If the parties had contemplated a simple measurement through a $\frac{3}{8}$ -inch choke they would have needed no addendum clause calling for expert engineers and an umpire. Their minds met on a test and not a measurement.

Had a simple measurement been suggested at the time the contract was executed, we are of opinion that the parties would have scoffed it away knowing full well that no 3000 barrels of oil would pass through such a choke. Such a construction of the test is an afterthought and the learned trial judge fell into error in following it.

The defendant Helis is bound by the tests made by the petroleum engineers. These tests inform that he should pay the higher amount provided in the agreement, \$400,000.00.

The court below will enter judgment for the appellants for their respective interests in the balance due under the contract, the same being \$100,000.00 with legal interest thereon from May 13, 1935.

The judgment is reversed and the cause remanded for [fol. 238] further proceedings not inconsistent with this opinion."

Reversed and remanded.

SIBLEY, Circuit Judge, Dissenting:

I cannot agree to the statement of the case made by the majority opinion, nor to the reversal of the judgment. The statement that Bernard well Number 3 "for many months actually produced more than three thousand barrels of oil per day" is unsupported by the record. During twenty months, six hundred days, 1,802,565 barrels were taken from the entire lease, an average of three thousand barrels per day, but wells No. 1, No. 3 and No. 4 were all producing it, and there is no evidence that No. 3 ever produced three thousand barrels any day. But what No. 3 did after the fifteen day test period named in the contract is unimportant. Whether it produced three thousand barrels or went dry would have no effect on the construction and application of the contract. Again, the attitude of Helis I do not think is fairly stated. He had men present at every test, who to be sure contended that it was only necessary to measure the oil produced through the $\frac{3}{8}$ " choke on the well to make the required calculation, but did permit on the last test other chokes to be experimented with. As to Judge Hardin, he stated that he was considering an offer of employment by the [fol. 239] seller in the apparently impending litigation. Helis correctly objected that he was disqualified to appoint

what the well could produce on a $\frac{3}{8}$ " choke. The instruction given the umpire by Judge Hardin to "calculate the open flow capacity of the well" was not authorized by Helis, who always contended that the open flow had nothing to do with the matter. The difference between the parties is and has always been about the meaning of their contract.

The one side contends that the calculation called for, to wit "the average daily production for a period of fifteen days after completion . . . calculated on a $\frac{3}{8}$ " choke according to the methods usually employed in gauging the capacity of oil wells" means that the well is to run for some hours on several of the fifteen days on a $\frac{3}{8}$ " choke and from the results obtained a calculation is to be made of what the average production in barrels would have been for the fifteen whole days. The other side contends that the meaning is to measure what the well would produce through a $\frac{3}{8}$ " choke for the fifteen days and from that calculate what it would have produced during the fifteen days if not choked at all. Either is a possible meaning. The evidence indicates that a very high gas pressure and a very light oil would have to be encountered for three thousand barrels to be forced through a $\frac{3}{8}$ " choke in twenty-four hours, and it is argued that the parties could hardly have meant that. On the other hand it is testified without dispute that it is impossible to calculate what a well would flow if unchoked by ascertaining what it flows on a $\frac{3}{8}$ " choke alone. So it would be equally improbable that the contract called for an impossible calculation of that sort. The last test resorted to the use of several chokes, and a noting of the increase of flow and decrease of pressure as the choke was enlarged, from which an opinion was formed that on a [fol. 240] $\frac{5}{8}$ " choke or larger three thousand barrels per day could be produced. But the contract does not call for opinions, but a calculation, and a calculation "according to the methods usually employed in gauging the capacity of oil wells." These are the key words of the contract. If we learn what the usual method employed is, we know what the parties here meant. Appellants' own expert witness Buck, who represented them at all the tests, testifies entirely without contradiction, thus:

"Q. What is the usual accepted method of ascertaining the capacity of a well when it comes in in the Gulf Coast country?

A. Along the Gulf Coast in Texas most wells are gauged through a $\frac{1}{4}$ " choke, Southwest Texas $\frac{3}{8}$ " choke, other parts of the State $\frac{1}{2}$ " choke—

Q. How did you test the capacity of Bernard No. 3 well on a $\frac{3}{8}$ " choke?

A. By placing a $\frac{3}{8}$ " choke in the tubing wing of the tree, closing the well off on the other wing of the tree, getting a back gauge on the battery of tanks, and getting a front gauge over a period of time to see how much the well produced over a period of time—

Q. Did you calculate the daily production on a $\frac{3}{8}$ " choke?

A. The daily production was calculated by taking the first one hour flow and multiplying that by twenty-four; the second two hours flow and multiplying by twelve.

Q. Isn't that the usual and customary method employed in the oil industry in getting the capacity of an oil well with a $\frac{3}{8}$ " choke?

A. No, that is not. In gauging the capacity of a well on a $\frac{3}{8}$ " choke the common practice would be a four hour flow, preferably a twelve hours flow; and still another, taking the actual oil produced every twenty-four hours. There would be no calculation there at all, you have actual physical record of the number of barrels produced—

Q. What was the daily production calculated on a $\frac{3}{8}$ " choke?

A. On a $\frac{3}{8}$ " choke on April 27 the well was producing at the rate of 51.79 barrels per hour—approximately 1233 barrels per day.

[fol. 241] Q. According to your calculation the daily production of the Bernard No. 3 well on a $\frac{3}{8}$ " choke, in accordance with the usual method in gauging the capacity of oil wells, was this figure you have just mentioned?

A. That is what the well was producing that day through a $\frac{3}{8}$ " choke, producing at that rate."

No witness claimed that it was usual or customary to do what was afterwards done by direction of Judge Hardin, in an endeavor to form an opinion as to what a well would do on some other choke, or wide open. Buck on his first test did what was usual and customary in calculating the capacity of the well on a $\frac{3}{8}$ " choke and found it to be 1233 barrels per day. The contract made no mention of using any other choke or ascertaining capacity when wide open. It speaks of calculation, but

calculation is necessary whenever oil is flowed into a receptacle, depending on the size and shape of the receptacle, to ascertain the barrels flowed in a day; and another calculation is necessary to reach the average for fifteen days. If a tank of known capacity is available the calculation may be simpler, but such might not be on hand the first two weeks after oil is struck. The trial judge correctly held that Buck's measuring the flow on a $\frac{3}{8}$ " choke for certain hours on three several days and from that calculating the flow for twenty-four hours and averaging the results was the method usually employed and that called for by the contract.

[fol. 242]

JUDGMENT

Extract from the Minutes of March 24th, 1939

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al.,

versus

WILLIAM HELIS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration, whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, William Helis, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Sibley, Circuit Judge, dissenting."

[fols. 243-246] PETITION FOR REHEARING—Filed April 14,
1939

United States Circuit Court of Appeals

FIFTH CIRCUIT.

No. 8725

**MRS. ITASCA KINNEY WARD, as Executrix of the
Estate of BRYAN WARD, deceased, ET AL.,**

Appellants,

versus

WILLIAM HELIS,

Appellee.

**PETITION FOR REHEARING TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.**

Comes now William Helis, the appellee in the above
and entitled cause, and presents this his petition for a
rehearing of said cause, and states the grounds therefor
to be:

I.

Your Honors have erred in holding that the contract in-
volved in this litigation required the determination of the
open flow or maximum capacity of the oil well.

II.

Your Honors have erred in adopting a construction of this contract which gives no meaning and no effect to the following requirements contained therein:

(a) That the purchase price shall be determined by "the average daily production—for a period of fifteen days after completion."

(b) That said average daily production shall be "calculated on a 3/8-inch choke."

(c) That said calculations on a 3/8-inch choke shall be made "according to the methods usually employed in gauging the capacity of oil wells."

III.

Your Honors have erred in holding that the word "calculated" does not correctly designate the operation or process of determining the average daily production for fifteen days of the oil produced on a 3/8-inch choke.

IV.

Your Honors have erred in holding that the word "calculated" and the words "capable of producing" abrogate and nullify the words "the average daily production * * * for a period of fifteen days after completion" when said word "calculated" and said words "capable of producing"

are fully susceptible of a construction consistent with the balance of the contract.

V.

Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record.

VI.

Your Honors have erred in so construing this contract as to require the payment of the additional price upon the basis of the open flow or maximum productive capacity of the well because such open flow or maximum productive capacity does not establish an increased value of the lease.

VII.

Your Honors have erred in holding that the construction contended for by appellee is an after-thought on his part. It is appellants who are urging a construction contrary to the intention with which they entered the contract.

VIII.

Your Honors have erred in allowing interest upon the entire judgment from May 13, 1935, instead of upon the amounts and from the dates as actually payable under the contract.

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted, or

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that argument of same be ordered and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

Lloyd J. Cobb
Morris Wright
COBB & SAUNDERS,
MORRIS WRIGHT,
Counsel for Appellee.

CERTIFICATE OF COUNSEL.

I, Lloyd J. Cobb, counsel for the above named, William Helis, Appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Lloyd J. Cobb
LLOYD J. COBB,

Counsel for William Helis,
Appellee.

[fol. 247] OPINION ON PETITION FOR REHEARING—Filed
April 26, 1939

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al., Appellants,

versus

WILLIAM HELIS, Appellee

Appeal from the District Court of the United States for the
Eastern District of Louisiana

On Motion for Rehearing

(April 26, 1939)

Before Sibley, Holmes and McCord, Circuit Judges

By the Court:

The court below will enter judgment for the appellants for their respective interests in the balance due under the contract, the same being \$100,000.00, with legal interest. This interest shall be computed on \$50,000.00 of the \$100,000.00 from May 13, 1935, the day it became due. Interest on the remaining \$50,000.00, which became due and payable [fol. 248] from the proceeds derived from oil produced on the lease, shall be computed from the time a sufficient amount of oil was produced to pay this sum. The opinion is corrected in this regard. Since neither of the judges who concurred in the opinion desire a rehearing, the motion therefor is

Denied.

Sibley, Circuit Judge, dissents.

[fol. 249] ORDER DENYING REHEARING

Extract from the Minutes of April 26th, 1939

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al.,

versus

WILLIAM HELIS

It is ordered by the Court that the petition for rehearing
filed in this cause be, and the same is hereby, denied.

"Sibley, Circuit Judge, dissents."

[fol. 250] MOTION AND ORDER STAYING MANDATE UPON FUR-
NISHING BOND—Filed May 5th, 1939

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al., Appellants,

versus

WILLIAM HELIS, Appellee

Appeal from the District Court of the United States for the
Eastern District of Louisiana

Now comes William Helis, the appellee above named and
moves this Honorable Court to enter an order staying its
mandate in this case under the provisions of Section 350 of
Title 28 of the United States Code to enable said appellee,
William Helis to apply for and obtain a writ of certiorari
from the Supreme Court of the United States.

(Signed) Lloyd J. Cobb, Cobb & Saunders, Attorneys
for Mover, William Helis.

[fol. 251] I hereby certify that it is the bona fide intention of the appellee, William Helis, to make application to the Supreme Court of the United States for a writ of certiorari within the time allowed by law and that I believe there is merit to such application. I further certify that a copy of this motion has been served on Mr. Andrew D. Martinez, one of the attorneys for the appellants above named and that copies thereof have been mailed to Judge W. D. Gordon and Judge William N. Bonner, the other counsel of record.

(Signed) Lloyd J. Cobb.

[fol. 252] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al., Appellants,

versus

WILLIAM HELIS, Appellee

On Consideration of the Application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is Ordered that, upon appellee giving bond in the sum of \$105,000.00 with good and sufficient security to be approved by the Clerk of this Court, with condition that if he fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay, the issue of the mandate of this court in said cause be and the same is stayed for the period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice

thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5th day of May, 1939.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 253] BOND FOR STAY OF MANDATE—Filed May 5th, 1939

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

No. 8725

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
Bryan Ward, Deceased, et al., Appellants,

versus

WILLIAM HELIS, Appellee

Bond for Stay of Mandate

Know All Men by These Presents, That we, William Helis as principal, and American Bonding Company of Baltimore as surety, acknowledge themselves to owe and be indebted unto Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, A. L. Mitchell, L. B. Mhoon and Y. D. Spell, in the penal sum of One Hundred and Five Thousand Dollars (\$105,000.00) for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents. The condition of the above obligation is such that:

Whereas, William Helis has heretofore made application in the above entitled and numbered cause for a stay of the mandate of the United States Circuit Court of Appeals for the 5th Circuit to enable him to apply for and obtain a writ of certiorari from the Supreme Court of the United States, upon consideration of which on May 5, 1939, an order was entered in said court staying said mandate upon the conditions set out therein and upon appellee, William

Helis, giving bond in the sum of One Hundred and Five Thousand Dollars as provided in said order.

Now in consideration of the premises, if the above bounden William Helis shall answer for and pay any and all damages and costs which the said Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, A. L. Mitchell, L. B. Moon and Y. D. Spell may sustain by reason of said stay, if the said William Helis fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application or fails to make his plea good in the Supreme Court, then the above obligation is to become null and void; otherwise to remain in full force and effect.

Signed and sealed this 5th day of May, 1939.

William Helis, (Signed) by Eugene D. Saunders,
Agent. American Bonding Company of Baltimore,
(Signed) by Arnold S. Kirchhoff, Atty.-in-fact.
(Seal.)

Witnesses: (Signed) Morris Wright, Edward N. Cobb.

Approved: (Signed) Oakley F. Dodd, Clerk, United States Circuit Court of Appeals for the 5th Circuit.

May 5th, 1939.

[fol. 255]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 228 to 254 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8725, wherein Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, deceased, et al., are appellants, and William Helis is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 227 are identical with the printed record upon

which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 5th day of May, A. D. 1939.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the question whether a new trial should not have been granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

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Office - Supreme Court, U. S.
FILED

MAY 26 1939

CHARLES ELMORE BROPLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1938.

No. _____

68

WILLIAM HELIS, *Petitioner,*

v.

**MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
BRYAN WARD, deceased, ET AL., *Respondents.***

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

**EUGENE D. SAUNDERS,
New Orleans, Louisiana,
*Attorney for Petitioner.***

**LLOYD J. COBB,
New Orleans, Louisiana,
*Of Counsel.***



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IN THE
Supreme Court of the United States

October Term, 1938.

No.

WILLIAM HELIS, Petitioner,

v.

**MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
BRYAN WARD, deceased, et al., Respondents.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

*To the Honorable the Supreme Court of the United States:
Your Petitioner Respectfully Shows:*

I.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

Petitioner, appellee in Circuit Court of Appeals, a resident of Louisiana, agreed to buy certain oil leases from respondents, residents of Texas, and to pay therefor either \$300,000.00 or \$400,000.00 dependent upon the rate of pro-

duction of oil from either of two oil wells to be drilled on the property subject to the leases. One of the wells did not produce so that the amount of the purchase must be determined solely by the production of the other well.

The contract provided, R. 28:

"(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00."

A choke is a device inserted in the pipe of an oil well which, like a nozzle, reduces the size of the orifice through which the liquid is permitted to flow.

Upon the trial in the District Court respondents attempted to justify the larger purchase price of \$400,000 by introducing evidence of the production of the well calculated upon test flows of oil through chokes of various sizes other than a 3/8-inch choke. Upon objection by petitioner the District Judge excluded the testimony as to everything except production upon a 3/8-inch choke (R. 103). The Judge observed in the course of the trial that the capacity of the well was to be calculated upon a 3/8-inch choke and that what it could do under this choke was the decisive factor in the case (R. 119). He further observed that there was no ambiguity in the contract (R. 107, 115).

Upon the close of the testimony for respondents, the following appeared as established by their witnesses and these facts were used by the District Judge in his opinion:

(1) The capacity of a well on any particular choke is what it will produce on that choke. If run on one choke for less than 24 hours the calculation of production would be the amount of oil produced on that choke over the given period of time, calculated to represent a 24-hour period (R. 113, 114, 115).

(2) The well in question was actually tested upon a 3/8-inch choke for various periods of time and the tests, calculated upon a 24-hour basis, showed a production of only 1,233 barrels per day instead of 3,000 barrels (R. 112, 113).

(3) The well in question could not produce 3,000 barrels of oil per day under a 3/8-inch choke, due to the type of the oil and volume of pressure which was present (R. 116).

(4) It was not the general practice to permit a well of this type to operate on open flow (without the use of a choke) (R. 106) and it would be impossible to calculate the open flow production of the well by calculations made on a 3/8-inch choke (R. 115, 116).

Relying upon the rulings of the trial judge that the production of the well operating under a 3/8-inch choke was the only issue in the case, petitioner introduced none of the evidence on other issues which it had available in court on the day of trial. The respondents themselves proved that the well could not make 3,000 barrels of oil per day on a 3/8-inch choke and the court so found and entered judgment for petitioner.

Respondents appealed to the Circuit Court of Appeals and secured a reversal of the judgment of the District Court and the entry of a judgment in their favor. One Circuit Judge dissented.

The Circuit Court of Appeals reinterpreted the contract provisions quoted at the beginning of this statement and held (1) that the issue in the case was the productive capacity of the well on open flow, without any choke, and not its average daily capacity on a 3/8-inch choke for the period stated in the contract; and (2) that the well could be made to produce more than 3,000 barrels per day on open flow.

Upon this theory and finding of fact the court reversed the judgment of the District Court and directed the entry of a judgment for respondents decreeing the price payable to be the greater amount of \$400,000 mentioned in the contract.

Apart from the violence done to the language of the contract by the Circuit Court of Appeals, its entry of judgment for respondents without remanding the cause for a new trial upon the new theory of the case deprives petitioner of substantial rights. Petitioner has had no real opportunity to offer his evidence upon the productive capacity of the well calculated upon any basis other than under 3/8-inch choke, since the District Court limited the trial to that one issue.

Furthermore, the finding of the Circuit Court of Appeals that the well would make more than 3,000 barrels of oil per day on open flow could be based only upon the opinions of two engineers whose tests of the well, as indicated by their reports, showed that the well did not produce 3,000 barrels per day under any of the chokes actually used by them (R. 204-208, 208-214). The well was never run on open flow. Petitioner was justified in disregarding these estimates when the trial judge ruled that production under a 3/8-inch choke was the only point at issue.

The statement in the opinion of the Circuit Court of Appeals that this well actually produced for many months more than 3,000 barrels of oil per day (R. 230) has, as pointed out in the first paragraph of the dissenting opinion of Judge Sibley (R. 235), no support in the record and results from confusing the total production of all the wells on the lease with the total production from the single well in question.

Even if the Circuit Court of Appeals correctly interpreted the provisions of the contract, which petitioner denies, justice demands that the case be remanded to the District Court for a new trial and a finding upon whether or not the well was capable of producing 3,000 barrels per

day upon open flow. Upon such a trial petitioner and respondents will both have an opportunity to introduce evidence upon the new issue not heretofore tried in court.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of said Court of Appeals in directing the rendering of judgment on a theory which was not tried in the District Court and as to which all evidence was excluded by the trial judge so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The decision of said Court of Appeals as to the manner of calculating the productive capacity of an oil well on a given choke, by holding the productive capacity to be its capacity upon some other size choke or with no choke, is a decision upon an important question of general law affecting the entire oil producing industry which is probably untenable and contrary to the understanding recognized and acted upon by those engaged in the industry.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket No. 8725, Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, deceased, et al., Appellants, versus William Helis, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by this court and the judgment of the

District Court be reinstated, or in the alternative, that the cause be remanded to the District Court for further trial, and for such further relief as to this court may seem proper.

WILLIAM HELIS,

By EUGENE D. SAUNDERS,
Attorney for Petitioner.

LLOYD J. COBB,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1938.

No.
_____WILLIAM HELIS, *Petitioner,*

v.

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of
BRYAN WARD, deceased, et al., *Respondents.*_____
**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

To the Honorable the Supreme Court of the United States:
Your Petitioner Respectfully Shows:

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 229) is reported in 102 F. (2d) 519; and the opinion of the United States District Court for the Eastern District of Louisiana (R. 85) is reported in 20 F. Sup. 514.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is March 24, 1939 (R. 229).

2. The statutory provision which is believed to sustain the jurisdiction of this court is United States Code, Title 28, Section 347 (a).

3. The trial court excluded all evidence designed to show the amount of oil the well was capable of producing on other than a 3/8-inch choke (R. 103). The Court of Appeals predicated its decision entirely upon its finding of fact as to the capacity of the well on other than a 3/8-inch choke (R. 237). In so deciding the said Court of Appeals acted upon a theory not tried in the District Court and upon facts not contained in the record, as so contended by petitioner in his application for rehearing (R. 245) and gave the contract an impossible construction at variance with the understanding prevailing throughout the oil producing industry (R. 244).

4. The cases believed to sustain said jurisdiction are as follows:

Willing v. Binstock, 302 U. S. 272;
Erie R. Co. v. Tompkins, 304 U. S. 64;
Duke Power Co. v. Greenwood County, 299 U. S. 259;
Lutcher & Moore Lumber Co. v. Knight, 216 U. S. 257;
Saunders v. Shaw, 244 U. S. 317.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under I (pp. 1-5), which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The court erred by deciding the merits of this case on facts not contained in the record and on a theory which had never been tried by the litigants and as to which the trial court had expressly excluded all evidence.

2. The court erred in holding that the average daily capacity of an oil well for a stated period, calculated on a specified choke, is the greatest amount of oil which such well can be computed to be capable of producing on any size choke, or without choke, for any period of time, no matter how brief.

ARGUMENT.**Summary of the Argument:**

Point A. When a litigant objects to the introduction of evidence and the objection is sustained he is fully justified in relying on such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

Point B. The daily capacity of an oil well calculated on any given choke, is the amount of oil the well is capable of producing on that choke in a twenty-four hour period. The average daily production or capacity of such well for a stated period, calculated on a given choke, is the average of what it did or could produce if operated constantly for such period on such choke. It is admittedly impossible to determine the capacity of an oil well on one choke by calculations based on what it produces on another choke. The average daily production or capacity of an oil well for a stated period is not determined by merely ascertaining its momentary peak production.

POINT A.**Case Decided on Point Not Litigated in Trial Court.**

Upon the trial in the District Court one of the witnesses for respondent started to testify as to production tests which he had made of the well on chokes other than a 3/8 inch (R. 103). Counsel for petitioner herein immediately objected to any such testimony (R. 103). The court thereupon ruled:

"I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103)

The report referred to by the trial judge was admissible because including tests made on a 3/8-inch choke, but not for any other purpose in view of this ruling. It is contained in the transcript (R. 204).

The principal witness for respondents and the only witness testifying to the capacity of the well, testified that the capacity of the well on a 3/8-inch choke was 1233 barrels per day (R. 112, 113); that the capacity of an oil well on a given choke was "just what it would produce" on that choke (R. 113, 115); and that it would be impossible to ascertain the open flow of the well by calculations made on a 3/8-inch choke (R. 115, 116).

As this evidence by the witness for respondents proved conclusively that the well could not produce anywhere near 3000 barrels per day on a 3/8-inch choke and as the trial judge had ruled that this was the only issue in the case, petitioner did not even place a witness on the stand to testify regarding the open flow capacity of the well. The trial judge rendered judgment for petitioner and respondents appealed.

The Court of Appeals concluded that the trial judge had erred in his construction of the contract and that its true meaning was to require the determination of the open flow capacity of the well. The Court of Appeals found the open

flow capacity of the well to be in excess of 3000 barrels per day and accordingly directed the District Court to enter judgment for the larger purchase price (R. 229). This finding of the capacity of the well by the Court of Appeals was predicated upon the report of an engineer or umpire which is in the record as a part of the pleadings but which was never offered in evidence (R. 208). This report would, however, have been admissible under the ruling of the trial judge both because dealing partly with the issue, capacity under 3/8 inch choke, recognized by that ruling and because being the report of an umpire designated under the contract.

A rehearing was applied for (R. 243) and refused (R. 249).

Judge Sibley dissented both from the judgment (R. 238) and from the refusal to grant a rehearing (R. 247).

The true import of the decision herein of the Circuit Court of Appeals is that the District Court erred in its ruling upon the objection to evidence and that it should have received evidence to show the open flow capacity of the well; that the decision of the District Court was predicated upon an improperly made record. Under virtually identical circumstances your Honors have declared it improper for the appellate court to render judgment and you have exercised your supervisory power to assure orderly procedure. In so doing you said:

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 256, 267.

You have said that identical procedure by the Supreme Court of a state deprived a citizen of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States; *Saunders v. Shaw*, 244 U. S. 317.

Your Honors have also said:

"Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented.

Duke Power Co. v. Greenwood County, 299 U. S. 259, 268.

In other decisions you have given effect to this same rule:

Collins v. Yosemite Park & Curry Co., 304 U. S. 518.
U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416.

Willing v. Binstock, 302 U. S. 272.

Erie R. Co. v. Tompkins, 304 U. S. 64.

The Circuit Courts of Appeals have repeatedly recognized and followed this rule so clearly enunciated by your Honors.

" * * * Since the District Court sustained the defendants' contention that this issue was not on trial, it is probable that they did not take their full proofs on that subject, and a final decision on the present record might be unjust. Under these unusual conditions, we see no way to insure that the full controversy shall be finally decided, in this case and upon a proper record, save to direct that the decree be reversed as to appellees and the case remanded; * * *

Fifth Third National Bank v. Johnson, 219 F. 89, 95.

To the same effect:

Columbus Gas & Fuel Co. v. City of Columbus, 55 F.(2d) 56.

Faulks v. Schrider, 90 F. (2d) 370.

Hughes v. Reed, 46 F. (2d) 435.

Wilson v. Spencer, 261 F. 357.

Underwood v. Com'n. of Internal Revenue, 56 F.(2d) 67.

Finefrock v. Kenova Mine Car Co., 22 F.(2d) 627.

Hamilton Gas Co. v. Watters, 75 F. (2d) 176.

POINT B.

Decision of Court of Appeals is Erroneous Decision of Important General Question of Law Affecting the Entire Oil Producing Industry.

The general question here presented is the method of ascertaining the capacity of an oil well on a given choke.

This transcript contains proof that the use of a choke on an oil well is the general practice of the industry (R. 117). The record shows that the capacity of an oil well on a given choke is what it will produce on that choke (R. 113).

The Court of Appeals has held in this case that the capacity of an oil well is the maximum it is capable of producing and that to require its capacity to be calculated on a 3/8-inch choke is merely to exact that its greatest capacity be computed by measurements taken on a 3/8-inch choke and used as a base along with measurements taken on other size chokes.

The importance of this question to the whole oil producing industry is evident. Every oil producing state of any consequence imposes restrictions on the rate or quantity of production of oil. Each field and each well is given an "allowable". This allowable is the amount of oil which may be legally produced per day. The amount of this allowable as to each well is determined principally by calculating the maximum capacity of the well on a choke of a prescribed size. Confusion as to the proper method of ascertaining

the capacity of an oil well by calculations made on a prescribed size choke would have far-reaching consequences. An authoritative decision of the question would be of inestimable benefit to the entire industry.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

EUGENE D. SAUNDERS,
Attorney for Petitioner.

LLOYD J. COBB,
Of Counsel.

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OCT 21 1939

CHARLES LEMMON GROPLEY
CLERK

**IN THE
Supreme Court of the United States**

October Term, 1939.

No 68

WILLIAM HELIS,

Petitioner,

versus

**MRS. ITASCA KINNEY WARD, as Executrix of the
Estate of Bryan Ward, deceased, et al.,**

Respondents.

**BRIEF ON BEHALF OF WILLIAM HELIS,
PETITIONER.**

**EUGENE D. SAUNDERS,
Attorney for Petitioner.**

**LLOYD J. COBB,
Of Counsel.**



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**TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:**

Your petitioner respectfully shows:

OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 229) is reported in 102 F. (2d) 519; and the opinion of the United States

District Court for the Eastern District of Louisiana (R. 85) is reported in 20 F. Supp. 514.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is March 24, 1939 (R. 229).

2. The statutory provision which is believed to sustain the jurisdiction of this court is U. S. Code, Title 28, Section 347 (a).

3. The trial court excluded all evidence designed to show the amount of oil which a certain oil well was capable of producing on other than a 3/8-inch choke (R. 103). The Circuit Court of Appeals predicated its decision entirely upon its finding of fact as to the capacity of said oil well on chokes other than a 3/8-inch choke (R. 237). In so deciding the Circuit Court of Appeals acted upon a theory not tried in the District Court and thereby deprived petitioner of his day in court.

4. The cases believed to sustain the jurisdiction of this court are as follows:

Willing v. Binenstock, 302 U. S. 272;

Erie R. Co. v. Tompkins, 304 U. S. 64;

Duke Power Co. v. Greenwood County, 299 U. S. 259;

Lutcher & Moore Lumber Co. v. Knight, 216 U. S. 257;

Saunders v. Shaw, 244 U. S. 317.

III.**SPECIFICATION OF ERRORS.**

The Circuit Court of Appeals erred by deciding the merits of this case on a theory which had never been tried by the litigants and as to which the trial court had, upon the objection of petitioner, excluded all evidence.

IV.**STATEMENT OF CASE.**

Your Honors have granted certiorari herein limited to the question of whether the Circuit Court of Appeals should have granted a new trial. We will accordingly confine our statement of the case to such facts as are relevant to this single issue.

Petitioner, by a written instrument (R. 26) was granted an option to purchase a certain oil lease owned by Iberia Oil Corporation and Y. D. Spell. Prior to the institution of this suit Iberia Oil Corporation was dissolved and all of its rights in the above mentioned contract, and the oil lease therein referred to, were transferred to respondents herein. At the time of the execution of this option contract respondents predecessors in title had completed one oil well and were drilling a second oil well on the leased property, which second well was known as "Bernard No. 2" and which they agreed to drill to completion (R. 27). Petitioner obligated himself to commence the drilling of a third oil well on said leased property, to be known as "Bernard No. 3," and to drill such well to completion or abandonment (R. 27).

The amount of the purchase price to be paid by petitioner was made dependent upon the volume of production of either of these two oil wells; it being provided by paragraph 3 of said contract:

"(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of producing more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00." (R. 28.)

Bernard No. 2 well was a failure and was abandoned but petitioner completed Bernard No. 3 as a producing oil well and thereupon gave to respondents timely notice of his election to exercise his option to purchase the oil lease.

Respondents immediately contended that the volume of production of Bernard No. 3 well was such that the purchase price should be \$400,000.00. Petitioner contended the price should be \$300,000.00. The instant suit was instituted for the purpose of having the amount of the purchase price judicially determined. Petitioner contended that the purchase price should be \$300,000.00 because the Bernard No. 3 well was not capable of producing more than 3,000 barrels of oil per day for a period of fifteen

days after completion, calculated upon a 3/8-inch choke. Respondents contended that the purchase price should be \$400,000.00 because the Bernard No. 3 well was capable of producing more than 3,000 barrels of oil per day.

A choke is a device inserted in the pipe of an oil well which, like a nozzle, reduces the size of the orifice through which the liquid is permitted to flow.

Upon the trial before the District Court respondents sought to introduce evidence showing tests and calculations made of the production of the Bernard No. 3 well on chokes of three different sizes. Petitioner immediately made the following objection:

"We object to any testimony by this witness with respect to three tests, on the ground that paragraph 3 of the contract of February 6th provides that the capacity of the well shall be calculated on a 3/8th inch choke according to the usual methods employed in gauging the capacity of oil wells, and that the capacity shall be based on average daily production for a period of 15 days after completion of the well, and that it is wholly immaterial to the issue involved herein, on any choke except 3/8th inch." (R. 103.)

Upon which objection the court ruled:

"I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103.)

Subsequently and repeatedly throughout the trial the District Judge ruled that the only issue in the case was the capacity of this well calculated on a 3/8-inch choke.

Every effort by counsel for respondent to escape the effect of the court's ruling was made the subject of objection and each such objection was sustained.

At one point counsel for respondents sought to introduce evidence of a hypothetical nature. The objection and ruling were:

"I object your Honor. The sole question before the Court under the contract is how much the well produced during the period of 15 days after completion, calculated on the 3/8th inch choke according to the usual method employed in gauging the capacity of the oil well."

"The Court:

"I sustain the objection." (R. 114).

Other statements made by the Trial Judge during the course of the trial and which disclose beyond any question of doubt the theory of such trial are the following:

"My idea about it is this. The Court does not think there is any ambiguity in the contract at all, and I do not see any necessity of evidence to try and explain the contract. I think it is quite clear anyone reading it can understand it." (R. 107.)

"I cannot see that it makes any difference what he has seen. It is what this well did on a 3/8th inch choke." (R. 119.)

"The capacity is to be calculated on a 3/8th inch choke." (R. 119.)

Based on these rulings of the trial judge the case was tried, submitted and decided upon the theory that the amount of the purchase price should be determined

by the capacity of the well "calculated upon a 3/8th-inch choke." Petitioner did not attempt to introduce evidence touching upon any other method of calculation and respondents were not permitted to do so. The evidence in the records is conclusive, in fact we understand respondents to concede, that the Bernard No. 3 well could not produce as much as 3,000 barrels per day on a 3/8-inch choke and the trial judge accordingly entered judgment for petitioner decreeing \$300,000.00 to be the correct amount of the purchase price.

Respondents appealed to the Circuit Court of Appeals and that court held that the District Judge had erred in holding that the contract required the capacity of the well to be determined by calculations and tests made solely upon a 3/8-inch choke. The appellate court held that the rights of the parties should "be determined by the amount of oil the well is capable of producing in a day" (R. 233) and that this should be determined by tests made upon a series of chokes (R. 234). The Circuit Court of Appeals further held that the evidence in the record showed that the well was capable of producing more than 3,000 barrels of oil per day and it accordingly reversed the judgment of the District Court and directed that judgment be entered decreeing the purchase price to be \$400,000.00 (R. 235).

Petitioner applied for a rehearing which was denied (R. 243).

ARGUMENT.

When a litigant objects to the introduction of evidence and the objection is sustained he is fully justified in relying on such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

The Circuit Court of Appeals pointed out that its determination of this case necessarily depended upon which of two possible theories it should adopt, saying:

"Our decision must turn upon the following questions: (1) Is the purchase price of the property to be determined by the amount of oil that can be produced by the well in a day through a 3/8-inch choke? (2) Is the purchase price of the property to be determined by the amount of oil the well is capable of producing in a day?" (R. 233.)

It then set forth its reasons for concluding that the second theory was the correct method of construing the contract and concluded by saying of the first theory:

"* * * Such a construction of the test is an afterthought and the learned trial Judge fell into error in following it." (R. 235.)

Thus it appears upon the face of the opinion of the Circuit Court of Appeals that:

(1) The first and fundamental point presented for determination was the construction to be given the written contract.

(2) Two distinct and different theories of construction were urged by the litigants.

(3) The District Court adopted a construction declared to be erroneous.

The Circuit Court of Appeals held that the contract should not be construed as meaning that the capacity of the well should be calculated on a 3/8-inch choke and that the correct construction required the use of a 3/8-inch choke as a base which with the use of other chokes to determine pressures and conditions would enable expert petroleum engineers to accurately calculate the amount of oil the well was capable of producing in a day. (R. 234.)

As we have pointed out, the record shows conclusively that the District Court expressly excluded the admission of evidence relevant only to the theory of construction adopted by the appellate court. Counsel for petitioner objected when the first witness made the first attempt to testify regarding tests made with chokes of different sizes. This is clearly reflected by the record.

"A. So we tested the well on three chokes the first time it was tested,—

"Objection: Mr. Cobb:

"We object to any testimony by this witness with respect to three tests, on the ground that paragraph-3 of the contract of February 6th provides that the capacity of the well shall be calculated on a 3/8th inch choke according to the usual methods employed in gauging the capacity of oil wells, and that the capacity shall be based on average daily production for a period of 15 days after completion of the well, and that it is wholly immaterial to the issue involved herein, on any choke except 3/8th inch."

"The Court:

"I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103.)

The trial judge never receded from this ruling. To the contrary, as we have pointed out in our statement of the case, he repeatedly sustained the same objection and to the very end of the trial limited the evidence to such as was relevant to what he had ruled to be the proper construction of the contract, viz.: the capacity of the well calculated on a 3/8-inch choke for a fifteen day period following its completion.

In view of this ruling petitioner did not and could not make any effort to meet the issue which the Circuit Court of Appeals subsequently ruled to be the only issue in the case, viz.: the maximum capacity of the well determined by tests made upon a series of chokes.

Petitioner was, we respectfully submit, entitled to rely upon the rulings of the trial judge. He could not anticipate the possibility that he would not be afforded the opportunity to litigate an issue which the appellate court might subsequently decide to have been improperly ex-

cluded by the district court. Orderly procedure requires that litigants conform to the rulings of the trial court in all matters.

The true import of the decision herein of the Circuit Court of Appeals is that the District Court erred in its ruling upon the objection to evidence and that the District Court should have received evidence intended to show the open flow capacity of the well. This is necessarily tantamount to holding that the decision of the District Court was predicated upon an incomplete and improperly made record. Obviously the real issue in the case has never been litigated when the trial judge excluded all evidence except that relating to a particular point or issue and that point or issue has been declared by the appellate court to be immaterial to the determination of the controversy.

Under virtually identical circumstances your Honors have declared that a decision such as was rendered by the Circuit Court of Appeals herein deprives a litigant of his day in Court. You said:

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 256, 267.

You have held that identical procedure by the Supreme Court of a state deprived a citizen of due process of law

contrary to the Fourteenth Amendment to the Constitution of the United States, *Saunders v. Shaw*, 244 U. S. 317.

Your Honors have also said:

"Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

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In other decisions you have given effect to this same rule.

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Willing v. Binenstock, 302 U. S. 272.

Erie R. Co. v. Thompkins, 304 U. S. 64.

The Circuit Courts of Appeals have repeatedly recognized and followed this rule of procedure so clearly enunciated and so firmly established by your Honors.

Fifth Third National Bank v. Johnson, 219 F. 89.

Columbus Gas & Fuel Co. v. City of Columbus, 55 F. (2d) 56.

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Hughes v. Reed, 46 F. (2d) 435.

Wilson v. Spencer, 261 F. 357.

Underwood v. Com'n. of Internal Revenue, 56 F. (2d) 67.

Finefrock v. Kenova Mine Car Co., 22 F. (2d) 627.

Hamilton Gas Co. v. Watters, 75 F. (2d) 176.

We respectfully submit that this petitioner should be afforded the opportunity to litigate the issue which the Circuit Court of Appeals has decreed to be the only real issue in this case and that unless this is done petitioner will have been deprived of his day in court through no fault of his but because of his entirely justifiable reliance upon the rulings of the trial judge.

PETITIONER HAS DEFENSE.

The fact that petitioner has been denied the opportunity to present a defense is, we submit, sufficient to show that he has been deprived of his day in court. The merit of his defense cannot be determined until it has been presented. We think it important to state, however, that petitioner believes he has an adequate defense and is entirely confident that a retrial of this cause on the theory announced by the Circuit Court of Appeals will result in judgment being again rendered in his favor.

The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer (R. 211-214) and the written report of an employee of respondents (R. 204-208). Neither of

these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading. Both reports would, however, have been relevant because of dealing in part with tests which the trial court ruled to be properly the subject of proof.

If these reports had been offered in evidence and if their contents had been ruled relevant to the issues petitioner would have shown that they were worthless in that the conclusions or opinions expressed therein were founded on errors apparent upon the face of the reports. The report principally relied upon is contained in a letter written by Mr. W. L. Massey (R. 204). Attached to and forming part of this letter is a sheet of calculations showing the formula used and the results obtained. The complete worthlessness of this report is apparent from the fact that not one of the calculations is correctly made. We list below the answers stated in this report and the answers arrived at by a proper solution of the formulas.

	Answer Stated in Report (R. 211)	Correct Answer
First formula	504	541.96
Second formula	500	499.95
Third formula	460	461.04
Fourth formula	123	114.22

Can there properly be any feeling of assurance that this engineer would have expressed the same opinion or reached the same conclusion when working on a totally different set of figures? In any event we submit that an opinion founded on mathematical calculations can

have no value when it is known that the mathematical calculations are erroneous.

Furthermore, upon the retrial of this case we would undertake to show that the formula by which Mr. Massey made his calculations and upon which he predicated all of his conclusions is a mathematical absurdity. We venture the statement that Mr. Massey will be compelled to admit on cross-examination either that he has devised a formula unknown to and beyond the comprehension of other and more eminent hydraulic engineers or that his conclusions are predicated far more upon conjecture than upon mathematical calculation.

Thus, we most respectfully submit, it appears upon the face of the record that petitioner has serious defenses to present before judgment can be rendered upon the construction which the Circuit Court of Appeals has given to this contract. Other questions not apparent upon the record as presently made will also arise.

For the foregoing reasons we respectfully submit that your Honors should order this case to be remanded to the District Court for further trial of the issues involved.

Respectfully submitted,

EUGENE D. SAUNDERS,
Attorney for Petitioner.

LLOYD J. COBB,
Of Counsel.

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JUN 23 1939

CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 68

WILLIAM HELIS, *Petitioner,*

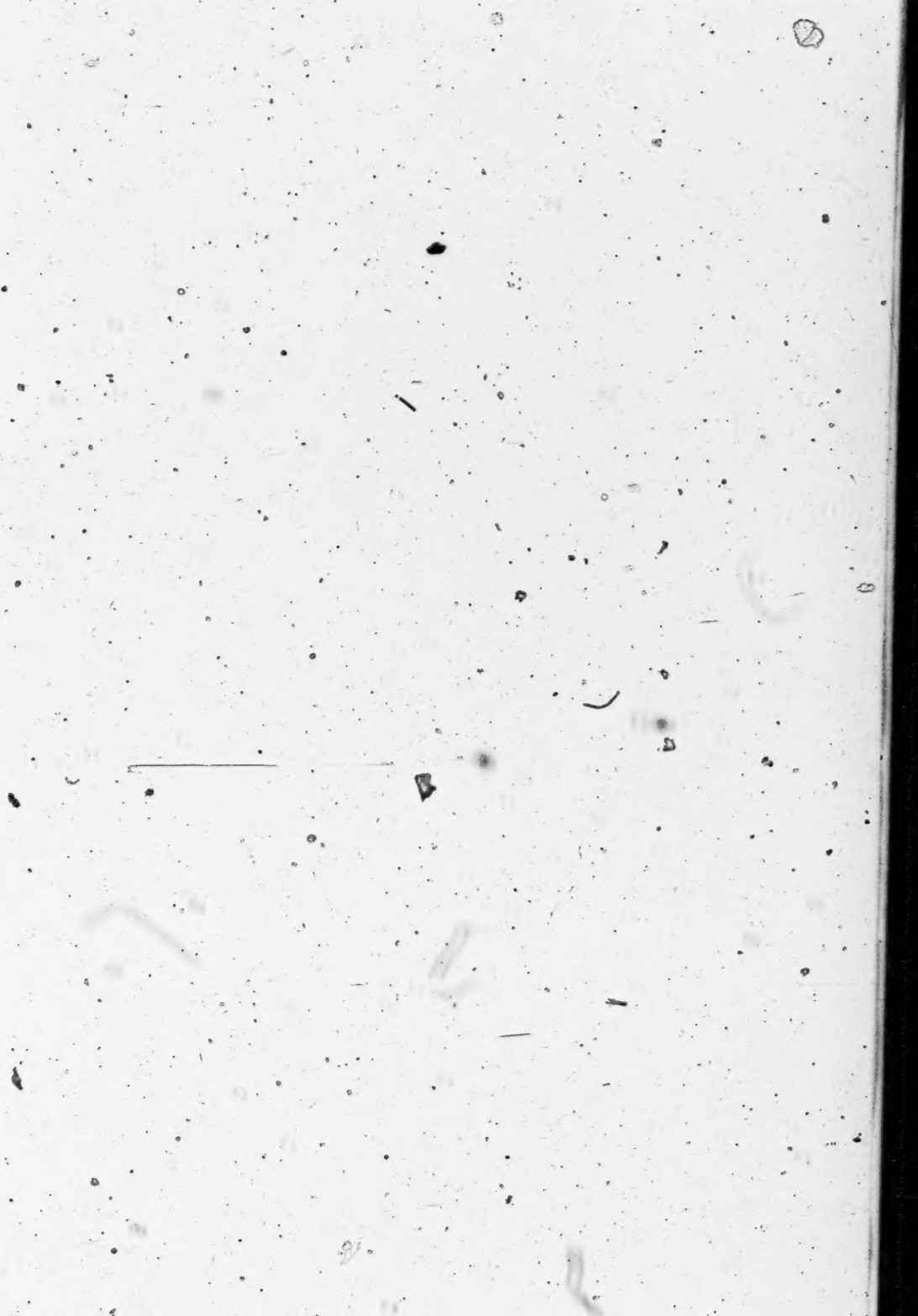
v.

MRS. ITASCA KINNEY WARD, *as Executrix of the Estate
of Bryan Ward, deceased, et al., Respondents*

**Brief of Respondents in Opposition to Petition for
Writ of Certiorari**

W. D. GORDON,
Beaumont, Texas.
Of Counsel

WM. N. BONNER,
Houston, Texas.
Attorney for Respondents



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 988

WILLIAM HELIS, Petitioner,

v.

**MRS. ITASCA KINNEY WARD, as Executrix of the Estate
of Bryan Ward, deceased, et al., Respondents**

**Brief of Respondents in Opposition to Petition for
Writ of Certiorari**

MAY IT PLEASE THE COURT:

I.

Statement of the Case

The only question involved in this case is the proper interpretation of a simple written contract, between private individuals, for the sale of an oil and gas lease.

On February 6, 1935, Iberia Oil Corporation and respondent Y. D. Spell entered into a written option contract with

petitioner William Helis, whereby they agreed, if he exercised the option given therein, to assign to him all their rights in and under an oil and gas lease covering 60 acres of land in the Little Bayou Oil Field in Iberia Parish, Louisiana (R. 26-37); Iberia Oil Corporation thereafter was dissolved, and all of its rights under said contract passed to its stockholders, Bryan Ward and respondents A. L. Mitchell and A. B. Mhoon (R. 136-144). Bryan Ward died while this suit was pending in the court below, and respondent Mrs. Itasca Kinney Ward, his widow and executrix, was substituted as a party (R. 83, 85). Hereinafter, respondents will be referred to as though they were the original parties to said contract. At the time the option contract was made respondents had drilled on the tract one producing oil well (called the Bernard No. 1) and were then engaged in drilling a second well (called the Bernard No. 2), which they agreed to drill to completion. As consideration for the option to purchase petitioner obligated himself to commence the drilling of a third well (called the Bernard No. 3) within 15 days from the date of the contract and at his own expense to drill the well to completion (R. 27). Paragraph 3 of the contract provided that if petitioner elected to purchase the lease, the purchase price should be determined as follows (R. 28):

"(a) In the event the Bernard No. 2 well or the Bernard well No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of the oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production [producing] more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

"The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of $\frac{1}{4}$ th of $\frac{7}{8}$ ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property."

By a paragraph incorporated into the contract as a signed addendum thereto the parties stated (R. 37):

"It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. H  lis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire."

Petitioner agreed to exercise his option to purchase within two days after the expiration of the 15-day test period provided in paragraph 3 (R. 29), and in that event he agreed to pay to respondents as additional consideration the cost of completing the Bernard No. 2 well whether it was a producer or not. It was agreed that upon exercise by petitioner of the option, respondents would execute to him an assignment of the lease on the form attached to the contract and deliver the assignment to the National Bank of Commerce in New Orleans (hereinafter called "the bank") for his attention; and petitioner agreed to accept the assignment and pay "the proper cash portion of the purchase price" within three days after he "shall have been notified in writing of the delivery of said assignment to the said bank" (R. 29-30). It was further agreed that if respondents failed to deliver the assignment, petitioner should have the right to deposit in the bank "the applicable cash portion of the purchase price and the instruments thereafter shall stand in lieu of the aforesaid assignment," and petitioner "shall thereafter own and

hold possession in the leasehold estate in the same manner as if the said assignment had been executed" (R. 30).

The Bernard No. 2 well was dry (R. 96, 110), and the Bernard No. 3 was completed as a producer on April 21, 1935 (R. 110).

By letter dated April 24, 1935, respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the Bernard No. 3 well was capable of producing much in excess of 3000 barrels per day; but if petitioner was not satisfied of that fact, respondents were ready to appoint a representative to make a test as provided by the option contract (R. 144-145).

After an exchange of telegrams between the parties on April 25, 1935 (R. 146-147, 177-178), it became evident that a test would have to be made; and on April 26th (R. 148, 178-179), respondents designated E. O. Buck as their representative to make a test and the parties agreed to have the test made on the following day (R. 148). Buck went to the lease next day to make the test, but Smith and Brashear, petitioner's representatives, refused to cooperate actively; and Buck then made tests alone and reported that the well was capable of producing in excess of 6000 barrels per day (R. 149-150, 204-208), but would not produce 3000 barrels per day *through* a $3/8$ -inch choke. The parties still being unable to agree, Judge C. F. Harden, as provided by the addendum to said contract (R. 37), appointed W. L. Massey to act as umpire in making a new test (R. 153-154, 180); but petitioner, though first agreeing to the appointment (P. 152-153), later objected (R. 181-195). Nevertheless, Massey made the test on May 4th in conjunction with Buck, respondents' representative, and one Smith, representing petitioner; and he found that while the well would not produce 3000 barrels per day *through* a $3/8$ -inch choke it was capable of producing "much in excess of 3000 barrels per day on an

open flow, or through any choke larger than a $5/8$ " choke" (R. 208-214). Buck concurred in Massey's findings and conclusions and adopted Massey's report of the test as his own (R. 210).

This was issue joined in the controversy which precipitated this lawsuit. Both parties conceded that the Bernard No. 3 well was incapable of producing 3000 barrels per day *through* a $3/8$ -inch choke, but that it was "capable of producing more than 3000 barrels per day" on open flow. Respondents contended that since the well was "capable of producing more than 3000 barrels per day" on open flow, calculated on a $3/8$ -inch choke, the purchase price for the lease was \$400,000 under a proper interpretation of the contract. On the other hand petitioner contended that the purchase price was not to be \$400,000 unless the well could produce more than 3000 barrels per day *through* a $3/8$ -inch choke, and since all parties conceded that the well was incapable of such production, the proper purchase price was \$300,000. The basis of the disagreement between the parties was one of interpretation of the option contract; *whether, under the terms of the contract, productive capacity of the well was to be measured (1) by the amount of oil per day it could produce "through" a $3/8$ -inch choke or (2) by the amount of oil it could produce on open flow "calculated on a $3/8$ -inch choke."*

The Trial Judge thought that under the terms of the contract, the productive capacity of the well should be measured *by the amount of oil per day it could produce "through" a $3/8$ -inch choke* (R. 85-93), and rendered judgment accordingly (R. 94). The Circuit Court of Appeals, disagreeing with the Trial Judge, held that under the terms of the contract the productive capacity of the well should be measured *by the amount of oil it could produce on open flow "calculated on a $3/8$ -inch choke"* (R. 228-235). The Circuit Court of Appeals accordingly reversed the judgment of the District

Court and remanded the cause with directions to enter judgment for respondents for \$100,000.00 with legal interest (R. 238, 243).

II.

ARGUMENT

Summary of the Argument

POINT A. Petitioner was not misled by any ruling of the trial judge in excluding evidence, and there is no just cause for remand of the case to the District Court, because the evidence upon which the Circuit Court of Appeals found that the Bernard No. 3 well was capable of producing more than 3000 barrels of oil per day was admitted without objection, was alleged by petitioner in his own pleading, and petitioner did not contend in the Circuit Court of Appeals, either in his brief or in his petition for rehearing or his brief in support thereof, that said well was not capable of producing more than 3000 barrels of oil per day or that such fact was not in issue at the trial in the District Court or that he was misled by any ruling of the Trial Judge in excluding evidence with reference thereto.

POINT B. Petitioner has failed to show any ground for certiorari either under Sec. 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925 [U.S.C.A., Title 28, Sec. 347(a)] or under SUPREME COURT RULE 38(5).

Point A

Petitioner concedes in his petition (p. 4) that the finding of the Circuit Court of Appeals, that the Bernard No. 3 well would make more than 3000 barrels of oil per day on open flow, is supported by the opinions and reports of Buck and Massey, the two petroleum engineers who conducted the tests to determine the open flow capacity by calculations

based upon actual production *through* a 3/8-inch choke. The evidence offered by respondents and excluded by the Trial Judge was merely cumulative of the facts contained in the reports. The report of Buck, admitted without objection (R. 149-150) contained this significant statement (R. 150):

"These results show that I am entirely certain of the conclusion that the well will actually produce far in excess of 3000 barrels per day on any choke through which it is permitted to flow as large as a 5/8-inch choke, and my conclusion is that by permitting the well to flow openly without restraint, it would produce in excess of 6000 barrels per day."

The report of Massey was to the same effect, *and petitioner so alleged* (R. 8) and attached a copy of Massey's report to his original petition (R. 8). The statements by petitioner in his petition (pp. 2, 3, 4) and supporting brief (pp. 10, 11), that he was misled by the ruling of the Trial Court in excluding the evidence offered by respondents, is without support in the record. On the other hand, petitioner heretofore has considered the reports of Buck and Massey as properly in evidence; and the evidence offered by respondents and excluded by the trial judge was merely cumulative of the facts shown by such reports. On page 5 of his original brief in the Circuit Court of Appeals petitioner said:

"Massey, in company with Buck, conducted a test and on May 6, 1935 reported that observations on chokes varying in size from 1/4-inch to 5/8-inch caused him to conclude that the well was capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow or through any choke larger than a 5/8-inch choke (Tr. pages 208-214). * * * The report of Mr. Massey was concurred in by Mr. Buck (Tr. page 210)."

In his brief in support of his petition for rehearing petitioner said (page 4):

"All that Mr. Massey said (p. 209) was 'I find that said Bernard #3 well is capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke.' Mr. Buck said (p. 205): 'The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day and my calculations show that this rate of flow could be obtained on approximately a 5/8" choke.' "

It appears, therefore, that until he filed his petition for certiorari, petitioner regarded the reports of Buck and Massey as properly in evidence and apparently conceded that the Bernard No. 3 well would produce in excess of 3000 barrels of oil per day on open flow. Indeed, he himself attached a copy of Massey's report to his original petition (R. 8). Never at any time in the Circuit Court of Appeals did he complain that said well was not capable of producing more than 3000 barrels of oil per day on open flow or that such fact was not in issue and established by the evidence at the trial in the District Court. In view of such facts the complaint now made by him, for the first time, in his petition for a writ of certiorari seems, at least, insubstantial.

This Honorable Court has frequently declared that it will refused to consider errors not assigned in the Circuit Court of Appeals. *HUSTY v. UNITED STATES*, 282 U.S. 694, 61 S.Ct. 240, 75 L.Ed. 629; *DUIGNAN v. UNITED STATES*, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996; *PIERCE v. UNITED STATES*, 255 U.S. 398, 41 S.Ct. 205, 65 L.Ed. 697. In *McLOUGHLIN v. RAPHAEL TUCK & SONS CO.*, 191 U.S. 267, 24 S.Ct. 105, 48 L.Ed. 178, the Court held that the error, if any, committed by a trial court in the admission of evidence is not reviewable

by writ of certiorari to a Circuit Court of Appeals where no error concerning the admission or rejection of evidence was assigned in the Circuit Court of Appeals and that Court had considered the case upon the assumption that the correctness of the rulings of the trial court in the admission of evidence was unchallenged. The principle of that decision, applied here, demonstrates that petitioner has failed to point out any substantial error authorizing the issuance of a writ of certiorari.

Point B

The only point determined by the Circuit Court of Appeals was the meaning of the phrase "calculated on a 3/8 inch choke" as used by the parties to the contract involved in this controversy. The intention of the parties as evidenced by the contract itself, the facts and circumstances surrounding its execution, and their acts and conduct subsequent thereto is not a question of gravity or importance to persons other than the parties to this suit. It is merely a question of interpretation of one particular contract between private individuals and presents no matter of such "peculiar gravity and general importance" as to warrant review by certiorari. This Honorable Court has frequently said that its jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari under Sec. 240(a) of the JUDICIAL CODE is to be "exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *HAMILTON-BROWN SHOE CO. v. WOLF BROS. & Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629; *HOUSTON OIL CO. v. GOODRICH*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385; *FORSYTH v. HAMMOND*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095. Furthermore, SUPREME COURT RULE 38(5) declares that "certiorari will be granted only where there are special and important reasons therefor;" and in paragraph (b) is indicated the character of reasons

which will be considered. The reasons urged here by petitioner do not appear to be of that character.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for a writ of certiorari should be denied.

WM. N. BONNER,
Houston, Texas.

Attorney for Respondents

W. D. GORDON,
Beaumont, Texas.
Of Counsel

Dated June 15, 1939.

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CHARLES LEMUE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 68

WILLIAM HELIS, *Petitioner,*

v.

**MRS. ITASCA KINNEY WARD, AS EXECUTRIX OF THE ESTATE
OF BRYAN WARD, DECEASED, ET AL., *Respondents***

**BRIEF ON BEHALF OF RESPONDENT
Y. D. SPELL**

WM. D. GORDON,
Beaumont, Texas,
Attorney for Respondent
Y. D. SPELL

WM. N. BONNER,
Houston, Texas,
Of Counsel



IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 68

WILLIAM HELIS, *Petitioner,*

v.

**MRS. ITASCA KINNEY WARD, AS EXECUTRIX OF THE ESTATE
OF BRYAN WARD, DECEASED, ET AL., *Respondents***

**BRIEF ON BEHALF OF RESPONDENT
Y. D. SPELL**

**TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:**

Answering the contention of the petitioner that the Circuit Court of Appeals, in deciding this case, acted upon a theory not tried in the District Court, entitling petitioner to a new trial, respondents show the facts from the record as developed in the trial court in support of the action of the Circuit Court of Appeals as follows:

It was the theory of respondents' case, as shown by their pleading and the unexcluded evidence, that the Bernard Well No. 3 produced an average daily production for a period of fifteen (15) days after its completion of more than three

thousand (3000) barrels a day, calculated on a $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the capacity of oil wells.

It was their contention in the trial court that the purchase price of the property was to be determined under the contract by the amount of oil the well was capable of producing in a day, which was to be calculated from the amount that it would produce through a $\frac{3}{8}$ -inch choke.

The theory of the petitioner in the trial court was that the amount of the purchase price of the property was to be determined by the amount of oil that the Bernard No. 3 well would produce in a day through a $\frac{3}{8}$ -inch choke. And it was upon this theory of the case that the trial court decided in favor of the petitioner.

It is evident that the only question in the case on appeal was as to whether, under the contract, the price was to be controlled by three eighths ($\frac{3}{8}$) choke on the production from the well in a day, or its entire production of eight eighths ($\frac{8}{8}$). In other words, for respondents to recover, was the well to produce more than three thousand (3000) barrels a day under a three eighths ($\frac{3}{8}$) flow, or a total flow without obstruction?

The amount that the well would produce on a three eighths ($\frac{3}{8}$) inch flow was to be the known factor by actual measurement, recognized as the unit *from which to compute the amount that the well would produce* by an open flow of eight eighths ($\frac{8}{8}$), or its entire orifice.

It was a part of the contract as a signed addendum clause (R. 57), as follows:

"It is agreed by the undersigned that the test provided for in Paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or

wells, Judge Hardin of the firm of Pujo, Hardin & Bell will appoint a reputable engineer to act as umpire."

Under this paragraph of the contract W. L. Massey was appointed by Judge Hardin as umpire to determine the capacity of the well. His instruction to Massey, a copy of which was sent to the attorney of respondents, W. N. Bonner of Houston, and the attorney of petitioner, Lloyd J. Cobb of New Orleans, was in part as follows:

"Filed Feb. 26, 1937.

"Pujo, Bell & Hardin,
Lake Charles, La.

"May 3, 1935.

"Mr. W. L. Massie,
c/o Railroad Commission of Texas,
Houston, Texas.

"Dear Sir:

"I have designated you to act as umpire in the test of a certain oil well situated on the Bernard lease in Iberia Parish, in accordance with a contract between Iberia Oil Corporation and Y. D. Spell on the one side and Mr. William Helis on the other. The well is designated as Bernard No. 3. You are requested to determine, first, the actual production of three-eighths ($\frac{3}{8}$) choke; second, by using the three-eighths ($\frac{3}{8}$) choke and you are to calculate the open flow capacity of the well" (R. 180).

This letter of instruction was attached as an exhibit to petitioner's pleading and made a part of the same, and was introduced in evidence by respondents without objection. Under this instruction Massey, together with another engineer, E. O. Buck, made a report of their tests on the well, in accordance with the instructions. This full report was attached as an exhibit and made a part of petitioner's petition, and was introduced in evidence by respondents without objection on the part of petitioner.

The report, consisting of the tests and the calculations made to support the conclusions reached, is found on pages 208-214, inclusive, of the Record. In this report, at page 209 of the Record, it states:

"Mr. Buck, Mr. Smith, and I conducted various tests on this well, the last of which was Sunday afternoon, and as a result of said tests I find *that said Bernard No. 3 well is capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow, or through any choke larger than a $\frac{3}{8}$ " choke.*"

Also, Mr. E. O. Buck had, previous to that time, on April 29, 1935, made a report of his test of the well. His report and calculation in support thereof is found on pages 204-208 of the Record, and in part was as follows:

"The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a $\frac{3}{8}$ " choke" (R. 205).

This report and calculation in support thereof was attached as an exhibit to petitioner's pleading and made a part thereof, and was also introduced in evidence by respondents without objection on the part of petitioner.

This witness E. O. BUCK, testified at the trial as follows:

By MR. GORDON:

Q. What do you mean by calculating the capacity of the well upon a certain choke?

Objection: MR. COBB:

I think we have already gone over that ground very carefully. I object.

THE COURT:

I think the witness has already explained it.

MR. GORDON:

I would like the answer in for the purpose of my bill.

THE COURT:

All right. Answer the question.

A. Calculation of production would be that amount of oil from the well produced on a certain choke over a given period of time, calculated to represent a 24-hour period.

Q. What would be the total capacity of that well on an open flow without any choke at all calculated on a $\frac{3}{8}$ th-inch choke?

Objection: MR. COBB:

I object to that question because the witness has already testified what the production of a well calculated on a $\frac{3}{8}$ th-inch choke was (R. 115).

By MR. GORDON:

"Q. Would that well be more or less than 3,000 barrels calculated on a basis of a $\frac{3}{8}$ th-inch choke, if there were no choke on the well?

Objection: MR. COBB:

That is the same question in another form.

THE COURT:

I assume so. Answer the question.

"A. The well would produce while I was there in excess of 3,000 barrels, a day, but you have to get a choke larger than $\frac{3}{8}$ th-inch to do it. It is impossible for oil with that pressure and that type to flow 3,000 barrels with a $\frac{3}{8}$ th-inch choke. It is physically impossible.

Objection: MR. COBB:

We move to strike the answer of this witness on the ground it is unresponsive, and immaterial to the contract between the parties.

THE COURT:

Overruled. It is not being tried before a jury (R. 116).

The Record shows the following concerning the testimony of this witness:

By MR. GORDON:

From your experience as an engineer which you detailed from the stand, are you able to state whether or not you can calculate the capacity of the oil well that you examined, No. 3, in this record, based upon the $\frac{3}{8}$ th-inch choke that your first test was made with?

Objection: MR. COBB:

I object to the question on the ground that it elicits, or attempts to elicit from the witness an answer which is irrelevant and immaterial to the issues involved, because the sole question before the court is what the well actually produced calculated on a $\frac{3}{8}$ th-inch choke for a period of 15 days after completion of the well.

THE COURT:

The court makes this observation. There has been offered in evidence here without objection this witness' report together with a chart amplifying same, showing production of a well on $\frac{1}{4}$ th choke, $\frac{3}{8}$ th-inch choke and $\frac{11}{16}$ th as I recall it—

THE WITNESS: Half inch.

THE COURT: Half inch.

THE WITNESS: Calculated then $\frac{5}{8}$ th-inch.

THE COURT:

And showed the scale and production of each one, and I do not see how the question could add anything to that testimony.

MR. GORDON:

I withdraw my question because I agree with Your Honor it is covered in their report attached to their answer (R. 108-109).

MR. COBB:

I reserve the right to cross-examine the witness" (R. 109).

He subsequently fully cross-examined this witness (R. 110, et seq.).

He further testified:

By JUDGE BONNER:

Q. Did Mr. Helis, or anyone speaking for him, or purporting to speak for him on that lease, ever ask you to do anything in the way of testing and so on that you did not coöperate in doing, and did they ever ask you to come another time, or make any request for coöperation that you did not comply with?

A. No. Nothing occurred on the lease in any way during the three different days that I was there. Mr. Brasher, the first day I met him on the road did not go to the lease. He told Mr. Massie and me that Mr. Smith would be there, and Mr. Smith was at the lease when we got there, and I told him what I wanted to do in the way of testing the well, and he told me to go ahead, but that I could not produce the well on a rate of flow in excess of $\frac{3}{8}$ th inch choke, and the first day I tested the well was on a flow of $\frac{3}{8}$ th inch, not larger than $\frac{3}{8}$ th inch.

Q. Whether he represented Mr. Helis or not, did those men in charge of the lease do what he told them to do, cut this particular well in separate tanks?

A. Yes, sir.

Q. On his request?

A. Yes.

Q. This fellow Smith?

A. Yes, sir.

Q. By the way; I think I asked you this question. When you went back there the first time, did the pressures on the well have a great deal to do with its potential capacity to produce?

A. Yes, sir.

Q. Were the pressures as good at the last as they were in the beginning?

A. The conditions at the well on the 5th day of May were identical, as I could determine from the surface of the ground, as they were on the 27th of April when I was there previously" (R. 118-119).

* * * By JUDGE BONNER:

Mr. Buck, I am not sure this morning that you testified on this point; I want to be sure. In your status and observation and experience, have you ever heard of one well in your life, or seen one, that would produce 3,000 barrels a day *through* a $\frac{3}{8}$ th inch choke?

Objection: MR. COBB:

I object to the question on the ground that the contract is the law between the parties, and that what this witness may have seen, or what he did not see in the oil industry is incompetent, irrelevant and immaterial, because the issue here is the capacity of the Bernard No. 3 well as fixed by the contract.

THE COURT:

I will permit the witness to answer the question.

A. No, I have never seen a well that would produce 3,000 barrels a day through a $\frac{3}{8}$ th inch positive choke.

Q. Have you ever read of one or known of one?

A. No, sir.

Q. Now just to gauge a well, just the process of gauging an oil well flowing into a tank, just to tell how much it is making a day, or hour, or week, is that a complicated or simple thing?

Objection: MR. COBB:

I object to that question. The witness has already testified as to the method of calculating the production of a well through any given choke. It is pure repetition.

JUDGE BONNER:

Counsel misunderstood my question I am afraid.

THE COURT:

He stated how it was done. He said at first he would get the measurement from the gauge tank and through the tank table ascertain how much oil there was in there and test that over a period of time and see how much oil there was in the lease or gauge tank.

By JUDGE BONNER:

Q. Is that an engineering problem, or can any school boy do it. Is it a complicated thing?

Objection: MR. COBB:

I object to the question on the ground it calls for the opinion of the witness.

By JUDGE BONNER:

Q. Let me make the question a little more full. Let us assume that the tank on this lease was strapped to begin with; when a tank builder builds a tank he gives you the strapping for it?

A. That is correct.

Q. That is a table which shows you how many barrels of oil are represented by say a foot in the tank, or an inch, something of the kind?

A. Yes, sir.

Q. Let us suppose that this tank was strapped to capacity, that one inch of oil represented 60 barrels, that was your strapping table. Then what would be the process of determining the production that actually went into the tank, no matter what size choke. Would it merely be to take two inches and that be 120 barrels, and so on, just a matter of multiplication; it is a simple process?

A. Yes, it is a simple process" (R. 121-122).

*** * * JUDGE BONNER:**

The court does not quite understand my point. To make it perfectly clear, if I understand the court, we are all together on it, that this complicated thing, they furnishing a man and we furnishing a man, and an umpire, no such process as that was ever contemplated to gauge a tank. If the Court is in agreement on that I will abandon it, but I want to make it clear on the evidence that just gauging a tank, any 18 year old boy can do.

THE COURT:

I concede that is a question of argument, but I think the facts are fully developed. You have all the latitude you want to bring out the facts bearing on this particular evidence" (R. 123-124).

Counsel for petitioner, as to the reports of Massey and Buck, at the trial announced that they were in evidence as follows:

Mr. COBB:

Judge Bonner attempted to show the purpose of the rider attached to the contract of February 6th, which called for the appointment of a petroleum engineer to act as umpire, and a man by the name of Massey was appointed, and the witness Buck concurred in his report. Both those reports are now evidence in this case, because the whole record in this case has been offered by Counsel for the defendant, and I think it quite material and proper to show the official act. Judge Bonner prefaced his remarks this morning that practically this whole transaction was handled by him and me. Frankly, I would have preferred not to introduce this file. It is only in the absence of Judge Hardin and Mr. Massey that I did it. My duty to my client is above my personal desires in the matter, and I have no alternative as I said, *therefore I offered them.*

THE COURT:

In view of the circumstances surrounding the trial I will allow the evidence to go in, though I confess I cannot see the relevancy of them. I will allow them to be offered in order to make up the record so the whole matter will be before the Court, and will reserve Counsel a bill" (R. 134-135).

At page 8 of *petitioner's petition for rehearing in the Circuit Court of Appeals*, he stated:

"The report of Mr. Buck (Tr. p. 204) discloses that he operated the well on a $\frac{1}{8}$ " choke, a $\frac{1}{4}$ " choke a $\frac{3}{8}$ " choke and a $\frac{1}{2}$ " choke; he ascertained the production and pressure obtained with each choke; and upon the basis of all the figures thus obtained reported:

"The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a $\frac{3}{8}$ " choke."

None of these facts were presented to Your Honors when you granted this writ.

Summary of the Argument

The substance of petitioner's claim that he is entitled to a new trial, as shown on pages 13 and 14 of his brief, is that reports of the engineers were not in evidence in the trial court. His statement is as follows:

"The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer (R. 211-14) and a written report of an employee of respondents (R. 204-208). Neither of these reports was offered in evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading."

These reports were *not only pleaded by petitioner, but conceded at the trial by his counsel to be in evidence, demonstrating that his statement to this Court that they were not, is groundless assumption.*

Facts pleaded by an adversary are established. However, these reports, as admitted by counsel at the trial, were properly in evidence without any objection of any kind or character on the part of petitioner. Moreover, in no wise were these facts disputed or denied. They seem undeniable. They were pleaded below by respondent and not traversed by this petitioner either in the trial or in the appellate court.

The position of petitioner for a new trial is *not that he has not had a trial upon the theory announced by the Circuit Court of Appeals in deciding the case, but that on a new trial on this theory that he will then object to these reports of these engineers and force respondents to place them upon the witness stand, when he will develop upon cross-examina-*

tion that the theory upon which the Circuit Court of Appeals decided the case will be destroyed.

His statement to this Court, on page 15 of his brief, is as follows:

"Furthermore, upon the retrial of this case we would undertake to show that the formula by which Mr. Massey made his calculations and upon which he predicated all of his conclusions is a mathematical absurdity. We venture the statement that Mr. Massey will be compelled to admit on cross-examination either that he has devised a formula unknown to and beyond the comprehension of other and more eminent hydraulic engineers or that his conclusions are predicated far more upon conjecture than upon mathematical calculation."

This is a substantial admission that petitioner has had a trial upon the theory of the case on which the Circuit Court of Appeals decided it, which disposes of the claim against petitioner *that he has not had his day in court under the Fourteenth Amendment* of the National Constitution.

That, on a new trial, if granted, the defendant by objection may exclude evidence that was competent on the first trial, or destroy it by cross-examination of a witness or by the production of the evidence of other witnesses, plainly does not support the claim that on the first trial he was deprived of his day in court on the issue.

It is apparent that the two cases (LUTCHER & MOORE LUMBER COMPANY V. KNIGHT, 217 U.S. 256-267; SAUNDERS V. SHAW, 244 U.S. 317) quoted from by petitioner in his application for the writ of certiorari have no application to the facts of this case.

The case of LUTCHER & MOORE LUMBER COMPANY V. KNIGHT, *supra*, was where a circuit court of appeals had refused to consider a defense to a suit which was made and developed in the trial court on the ground that such defense

was equitable and not cognizable in a court of law. And since the Circuit Court of Appeals had refused to consider such defense in deciding the case, the Supreme Court granted the writ and remanded the case, not to the trial court where the defense had been developed, but to the Circuit Court of Appeals, requiring that that court rehear and determine such excluded defense.

The case of *SAUNDERS V. SHAW*, *supra*, was where the plaintiff sought an injunction against the collection of certain drainage bonds on the ground "that his land was not benefited by the drainage improvement." And the trial court, as against an intervening bond holder, held that this was no defense and denied the plaintiff thereby an opportunity to present his evidence. And the Supreme Court held that this defense to the bond should have been heard by the introduction of evidence and determined by the trial court.

The action of the trial court in that case was as upon demurrer to the pleadings of this defense, depriving the plaintiff of the opportunity thereby to present his evidence in support of his claim.

Conclusion

The record of this case shows that the petitioner was at no time denied the right to controvert, but allowed to stand undisputed the facts adduced on the part of these respondents.

The record shows that he was wrong (as the Circuit Court of Appeals held that he was wrong), in his contention that the well had to produce over 3,000 barrels *through* a $\frac{3}{8}$ th inch choke. This petitioner throughout the extended litigation in the trial court, and until the decision of the Circuit Court of Appeals, made no question or dispute that this well—one of the largest ever discovered in the Gulf Coast country—was capable of producing oil largely in excess of 3,000 barrels per day. And that was the issue tried and determined upon the record by the district court and the Circuit Court

of Appeals, the only difference and contention being as what was meant by the contract specifying the method of calculation of the total capacity of this well.

It is respectfully submitted that the petitioner's counsel who saw fit to stand or fall upon his construction of the expression in the contract, with the fullest opportunity of combat, if he saw fit to do so, the evidence that this well was capable of producing oil vastly in excess of 3,000 barrels per day, has not had his constitutional rights violated, as he alleged. He had his "day in court" and the Constitution does not guarantee any man that his counsel, with all the privileges of the court open to him, can refuse to produce controverting evidence against his adversaries, relying upon some theory that the respondents' evidence is not legally sufficient, and claim, when he loses, that the Fourteenth Amendment has been violated.

The Fourteenth Amendment, as this Court has frequently said, was never so purposed.

Counsel writing this brief represents the respondent Y. D. Spell, and it is intended on behalf of all respondents to supplement the brief already filed by counsel for respondent Ward, et al.

It is most respectfully submitted that the petition was improvidently granted, and it should be dismissed. If this is not done, then that this Honorable Court, upon consideration of the case, should affirm the action of the Circuit Court of Appeals.

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Y. D. SPELL

NOV 6 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1939

NO. 68

WILLIAM HELIS, *Petitioner,*

v.

MRS. ITASCA KINNEY WARD, *as Executrix of the Estate of
Bryan Ward, deceased, et al., Respondents*

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

MAY IT PLEASE THE COURT:

I.

Statement of the Case

Believing that petitioner's statement of the case in his brief is incomplete in several material respects, respondents prefer to make a separate statement.

On February 6, 1935, Iberia Oil Corporation and respondent Y. D. Spell entered into a written option contract with petitioner William Helis, whereby they agreed, if he exercised the option given therein, to assign to him all their rights in and under an oil and gas lease covering 60 acres of land in the Little Bayou Oil Field in Iberia Parish, Louisiana (R. 26-37). Iberia Oil Corporation thereafter was dissolved; and all of its rights under said contract passed to its stockholders, Bryan Ward and respondents A. L. Mitchell and A. B. Mhoon (R. 136-144). Bryan Ward died while this suit was pending in the District Court, and respondent Mrs. Itasca Kinney Ward, his widow and executrix, was substituted as a party (R. 83-85). Hereinafter, respondents will be referred to as though they were the original parties to said contract.

At the time the option contract was made respondents had drilled on the land one producing oil well (called the Bernard No. 1) and were then engaged in drilling a second well (called the Bernard No. 2), which they agreed to drill to completion. As consideration for the option to purchase, petitioner obligated himself to commence the drilling of a third well (called the Bernard No. 3) within 15 days from the date of the contract and at his own expense to drill the well to completion (R. 27). Paragraph 3 of the contract provided that if petitioner elected to purchase the lease, the purchase price should be determined as follows (R. 28):

"(a) In the event the Bernard No. 2 well or the Bernard well No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the capacity of the oil wells.

"(b) In the event either the Bernard No. 2 or the

Bernard No. 3 well should be brought in capable of production [producing] more than 3000 barrels per day, calculated as above-set forth, then the purchase price shall be \$400,000.00.

"The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of $\frac{1}{4}$ th of $\frac{7}{8}$ ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property."

By a paragraph incorporated into the contract as a signed addendum clause the parties stated (R. 37):

"It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire."

Petitioner agreed to exercise his option to purchase within two days after the expiration of the 15-day test period provided in paragraph 3 (R. 29), and in that event he agreed to pay to respondents as additional consideration the cost of completing the Bernard No. 2 well whether it was a producer or not. It was agreed that upon exercise by petitioner of the option, respondents would execute to him an assignment of the lease on the form attached to the contract and deliver the assignment to the National Bank of Commerce in New Orleans (hereinafter called "the bank") for his attention; and petitioner agreed to accept the assignment and pay "the proper cash portion of the purchase price" within three days after he "shall have been notified in writing of the delivery of said assignment to the said bank" (R. 29-30). It

was further agreed that if respondents failed to deliver the assignment petitioner should have the right to deposit in the bank "the applicable cash portion of the purchase price and this instrument thereafter shall stand in lieu of the aforesaid assignment," and petitioner "shall thereafter own and hold possession of the leasehold estate in the same manner as if the said assignment had been executed" (R. 30).

The Bernard No. 2 well was dry (R. 96, 110), and the Bernard No. 3 well was completed as a very large producer of oil on April 21, 1935 (R. 110). From that date to February 26, 1937, when this case was tried in the District Court, 2,000,000 barrels of oil, or more, was produced from the lease and sold by petitioner for prices ranging from \$0.90 to \$1.04 per barrel (R. 95-96, 109-110, 163-164).

By letter dated April 24, 1935, respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the Bernard No. 3 well was capable of producing much in excess of 3000 barrels of oil per day; but if petitioner was not satisfied of that fact, respondents were ready to appoint a representative to make a test as provided in the option contract (R. 144-145):

After an exchange of telegrams between the parties on April 25, 1935 (R. 146-147, 177-178), it became evident that a test would have to be made; and on April 26th (R. 148, 178-179), respondents designated E. O. Buck as their representative to make a test and the parties agreed to have the test made on the following day (R. 148). Buck went to the lease next day to make the test, but Smith and Brashear, petitioner's representatives, refused to actively cooperate; and Buck then made tests alone and reported that the well was capable of producing in excess of 6000 barrels per day (R. 149-150, 204-208), but would not produce 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke. The parties still being

unable to agree, Judge C. F. Hardin, as provided by the addendum clause of said contract (R. 37), appointed W. L. Massey to act as umpire in making a new test (R. 153-154, 180); but petitioner, though first agreeing to the appointment (R. 152-153), later objected (R. 181-195). Nevertheless, Massey made the test on May 4th in conjunction with Buck, respondents' representative, and one Smith, representing petitioner; and he found that the well would not produce 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke but was capable of producing "much in excess of 3000 barrels per day on an open flow" (R. 208-214). Buck concurred in Massey's findings and conclusions and adopted Massey's report of the test as his own (R. 210).

Thus was issue joined in the controversy which precipitated this lawsuit. Both parties conceded that the Bernard No. 3 well was incapable of producing 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke, but the petroleum engineers reported that it was "capable of producing more than 3000 barrels per day" on open flow. Respondents contended that since the well was "capable of producing more than 3000 barrels per day" on open flow, calculated on a $\frac{3}{8}$ -inch choke, the purchase price for the lease was \$400,000 under a proper interpretation of the contract. On the other hand, petitioner contended that the purchase price was not to be \$400,000 unless the well could produce more than 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke, and since all parties conceded that the well was incapable of such production, the proper purchase price was \$300,000.00. The basis of the disagreement between the parties was one of interpretation of the option contract: *whether, under the terms of the contract, productive capacity of the well was to be measured (1) by the amount of oil per day it could produce "through" a $\frac{3}{8}$ -inch choke or (2) by the amount of oil it could produce on open flow "calculated on a $\frac{3}{8}$ -inch choke."*

After some correspondence between the parties (R. 155-161, 195-198) respondents, on May 11, 1935, executed, on the form attached to the original option contract, an assignment to petitioner of the lease (R. 136-139). The assignment recited a consideration of \$400,000, one half thereof in cash and the remaining one half thereof out of one fourth of seven eighths of the oil produced from the lease; *and respondents, by the terms of the assignment, expressly reserved one fourth of seven eighths of the oil produced from the land until they were paid by petitioner the sum of \$200,000.00 from the proceeds of such oil.* The assignment was attached to two drafts drawn on petitioner for the \$200,000.00 cash portion of the consideration, respondents' cost of completing the Bernard No. 2 well, and the value of certain oil in storage on the lease; and the drafts and assignment were forwarded to the National Bank of Commerce in New Orleans, as provided by the contract (R. 166-167). The drafts were paid by petitioner on May 14th (R. 166-167) *and the assignment was delivered to him and filed for record in Iberia Parish on May 15th* (R. 139). Ten minutes after he paid the drafts a writ of garnishment was served on the bank (R. 44-45).

Petitioner, a citizen of Louisiana, had filed suit against respondents, citizens of Texas, in the Civil District Court of Orleans Parish either prior to or immediately after he paid the drafts, and the writ of garnishment was issued out of that suit (R. 2-40). By his suit petitioner sought recovery of that portion of the amount paid to the bank which was in excess of the \$150,000 which he contended was due to respondents. Upon petition of respondents the case was properly removed to the United States District Court for the Eastern District of Louisiana (R. 47-61). After removal, respondents filed their answer and cross-action praying for recovery of the unpaid balance of the purchase price of \$400,000 and in the

alternative for rescission and cancellation of the contract and assignment (R. 61-68). Thereafter *petitioner voluntarily dismissed his suit* (R. 74), and filed his reply to respondents' cross-bill (R. 75-82). The suit was tried on February 26, 1937, and by opinion filed September 3, 1937 (R. 85-93) and decree signed September 27, 1937, the District Court denied respondents any relief and dismissed their cross-bill (R. 94). The opinion of the District Court is reported in 20 F. Supp. 514. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause with directions to enter judgment for respondents for \$100,000.00, with legal interest (R. 238, 243). The opinion of the Circuit Court of Appeals is reported in 102 F. (2d) 519.

II.

ARGUMENT

Summary of the Argument

POINT A: The Circuit Court of Appeals found as a fact that petitioner was bound by the tests made by two competent petroleum engineers who were properly designated, under the express terms of the contract, to determine, among other facts, the amount of oil the Bernard No. 3 well was capable of producing on open flow; and since the reports of such tests were properly in evidence and disclosed that such well was capable of producing much in excess of 3000 barrels per day on open flow, that fact is binding upon petitioner and no purpose would be served by remanding the case for a new trial on that issue.

POINT B: The undisputed evidence discloses that petitioner, with full knowledge of the controversy then existing between the parties over the proper purchase price of the lease, ac-

cepted from respondents and promptly filed for record an assignment reserving to respondents an oil payment of \$200,-000.00, and that he now holds and claims title to the lease under and by virtue of that assignment. Consequently, petitioner is estopped as a matter of law to deny his obligation to pay respondents the consideration recited in said assignment; and the judgment of the Circuit Court of Appeals, awarding respondents the unpaid portion of said oil payment, was the only judgment that properly could have been rendered under the facts, and should be affirmed.

Point A

The Circuit Court of Appeals found (R. 231) that E. O. Buck and W. L. Massey, petroleum engineers, made their tests of the Bernard No. 34 well strictly in accordance with the provisions of paragraph 3 and the addendum paragraph of the contract, that the tests were fairly, thoroughly and competently made, and (R. 235) that *petitioner is "bound by the tests made by the petroleum engineers."*

Both Buck (R. 149-150, 208-210) and Massey (R. 208-210), after the tests were made, reported that the well would not produce 3000 barrels of oil per day *through a 3/8-inch choke but would produce "far in excess of 3000 barrels of oil per day on open flow."*

In view of the finding of the Circuit Court of Appeals that petitioner is "bound by the tests made by the petroleum engineers," the reports giving the results of such tests must, if properly in evidence, be accepted as conclusive of the facts and opinions expressed therein. That such reports *were* properly in evidence appears affirmatively from the record. In petitioner's original petition by which this suit was instituted he admitted that Buck (R. 6) and Massey (R. 8) had made tests of the well, and their joint report was attached as an

exhibit to the petition (R. 208-214). Also attached as an exhibit was a letter from Buck to Wm. N. Bonner, attorney for respondents, detailing the results of his first test (R. 204-208). In his brief here (pp. 13-14) petitioner says: "Neither of these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading." That statement is erroneous. A copy of Buck's first report, addressed to all interested parties, *was offered in evidence by respondents and admitted without objection* (R. 149-150; see, also, the comment of the District Court, R. 108).

In its opinion the District Court considered the reports as part of the evidence in the case. In the Circuit Court of Appeals, petitioner conceded that the tests were made and admitted the substance of the reports. In his brief in that court, he said (pp. 4-5):

"On April 29, 1935, Buck rendered a report based on his observation of the well on two different days and on various chokes ranging in size up to $\frac{1}{2}$ inch, his conclusions being that the well was incapable of producing 3000 barrels per day on a $\frac{3}{8}$ inch choke, but that it would produce in excess of 3000 barrels per day on any choke as large as a $\frac{5}{8}$ inch choke (Tr. pages 149, 204-208).

"Over the protests of Helis, (Tr. page 181) W. A. Massey, a petroleum engineer was designated as an umpire pursuant to the rider to the contract of February 6, 1935, set forth above (Tr. pages 153, 154, 180). Massey, in company with Buck, conducted a test and on May 6, 1935, reported that observations on chokes varying in size from $\frac{1}{4}$ inch to $\frac{5}{8}$ inch caused him to conclude that the well was capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow or through any choke larger than a $\frac{5}{8}$ inch choke. (Tr. pages 208-214). He further found, pursuant to his instructions from Judge Hardin to find

the producing capacity of the well on a $\frac{3}{8}$ inch choke that: 'the well will not make 3000 barrels per day on such $\frac{3}{8}$ choke' (Tr. page 209).

"The report of Mr. Massey was concurred in by Mr. Buck (Tr. page 210)."

In his petition for rehearing in that court, he referred to the reports time and again (pp. 4, 8-9, 24-35, 30). He said (p. 8):

"The report of Mr. Buck (Tr. p. 204) discloses that he operated the well on a $\frac{1}{8}$ " choke, a $\frac{1}{4}$ " choke, a $\frac{3}{8}$ " choke and a $\frac{1}{2}$ " choke; he ascertained the production and pressure obtained with each choke; and upon the basis of all the figures thus obtained reported:

"The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a $\frac{3}{8}$ " choke."

It is apparent, therefore, that until he filed his petition for certiorari, petitioner had never contended in either of the courts below that the reports of the petroleum engineers were not properly in evidence. On the other hand, he had uniformly considered that the reports *were* in evidence, and upon the facts set forth therein he had argued in the Circuit Court of Appeals for affirmance of the judgment of the District Court.

It is a familiar principle that "a party having admitted or assumed the existence of certain facts in the lower court, he is estopped to controvert the existence of such facts when the case is heard on appeal." (19 Am. Jur. 723; 8 Am. & Eng. Ann. Cas. where the cases are collated). A clearer case than the one at bar for the application of that principle can hardly be supposed.

In his petition (p. 4) petitioner asserts that the case should

have been remanded to the District Court for "a finding upon whether or not the well was capable of producing 3000 barrels per day upon open flow. Upon such a trial petitioner and respondents will both have an opportunity to introduce evidence upon the *new issue not heretofore tried in court.*" (Italics added.) The so-called "new issue" has been the only point in dispute since the inception of this controversy. The Bernard No. 3 well was completed as a producer on April 21, 1935 (R. 110). Three days later respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the well was capable of producing much in excess of 3000 barrels per day (R. 144, 145). On April 29, 1935, Buck made his first test and reported that the well was capable of producing in excess of 6000 barrels per day *on open flow* (R. 149-150, 204-208). On May 3, 1935, as provided in the addendum clause of the contract, Judge C. E. Hardin designated W. L. Massey to act as umpire, instructing him to determine, first, the actual production through a $\frac{3}{8}$ -inch choke, and secondly, "by using the three-eighths ($\frac{3}{8}$) choke you are to calculate *the open flow capacity of the well.*" (Italics added.) Massey's tests and report (R. 208-214) were made pursuant to that appointment. Since Buck and Massey acted as arbitrators under the express terms of the contract, their reports, if fairly and competently made, were binding on the parties. The Circuit Court of Appeals so found and so held. Hence, no purpose would be served in remanding the case for trial of issues of fact already set at rest by the findings and conclusions of the arbitrators.

Petitioner complains that he was misled by rulings of the Trial Court excluding testimony regarding tests of the Bernard No. 3 well on chokes of sizes other than $\frac{3}{8}$ -inch. In his brief (p. 5) he says:

"Subsequently and repeatedly throughout the trial the District Judge ruled that the only issue in the case was the capacity of this well calculated on a $\frac{3}{8}$ -inch choke."

After quoting the objections and rulings thereon (pp. 5-6) he concludes (pp. 6-7):

"Based on these rulings of the trial judge the case was tried, submitted and decided upon the theory that the amount of the purchase price should be determined by the capacity of the well 'calculated upon a $\frac{3}{8}$ -inch choke.'"

He then complains (p. 7) that because of such rulings he offered no evidence touching upon any other *method of calculation*; and he asserts that the judgment of the Circuit Court of Appeals is based upon its conclusion that the amount of oil the well is capable of producing in a day should be determined by tests made upon a *series of chokes*. That petitioner's complaint is without merit is affirmatively disclosed by the record.

The Circuit Court of Appeals correctly held that under paragraph 3 of the contract the determinative fact is whether the Bernard No. 3 well was capable of producing in excess of 3000 barrels of oil per day on open flow. That court did not hold, as petitioner asserts, that such amounts should be determined by tests made upon a *series of chokes*. The amount of oil the well could produce in a day through any particular choke is not in issue. That fact is material only insofar as it aids in determining the ultimate fact of whether the well was capable of producing in excess of 3000 barrels of oil per day on open flow. There is no magic in the provision of the contract that the capacity of the well should be "calculated on a $\frac{3}{8}$ -inch choke." That provision merely prevented the well from being flowed, during the test period, through an

orifice of such size as might result in irreparable injury to the well.

The undisputed evidence establishes that the productive capacity of an oil well is never gauged by permitting the well to produce on open flow (R. 106). Oil wells in the Gulf Coast area are not produced on open flow (R. 116-117). In order to produce oil with maximum efficiency and conserve the gas pressure which prolongs the life of a well, every flowing oil well produces through a small orifice, called a "choke," attached to the top of the tubing from which the fluid flows. Because of underground conditions which vary in every oil field, the choke used may be $\frac{1}{8}$ -inch, $\frac{1}{4}$ -inch, $\frac{3}{8}$ -inch, $\frac{1}{2}$ -inch, $\frac{5}{8}$ -inch or any other size. To ascertain the open-flow capacity of any well two steps are necessary: (1) the well must be permitted to flow for periods of several hours *through a particular choke* in order to obtain a record of actual production; and (2) short tests must be made on other chokes to ascertain variations in pressure and velocity of fluid "to determine the correct physical condition of the well" on the choke by which the record of actual production is made. The short tests made by Buck and Massey on other chokes, were for the sole purpose of determining "the correct physical condition of the well on a $\frac{3}{8}$ -inch choke" (R. 209). The procedure is detailed by them in their reports (R. 204-214). The graphs attached to their joint report (R. 213-214) show the interrelation between velocity of fluid, size of choke and the amount of oil actually produced; and the formula used by them in calculating the capacity of the well on unrestricted, unchoked or open flow simply derives the quantity of fluid per hour from those factors (R. 211). Once a ratio in velocity of fluid is established between chokes of various sizes, it becomes obvious as a mathematical fact that the formula would correctly calculate, from actual production through a $\frac{3}{8}$ -inch choke, the capacity of the well on open

flow or through an orifice of any size. When the parties agreed that the capacity of the Bernard No. 3 well should be "calculated on a $\frac{3}{8}$ -inch choke," it is obvious that their single purpose was to guard against the danger of irreparable injury to the well in permitting it to flow for long periods of time through a large orifice. The fact to be ascertained—the amount of oil the well was capable of producing on open flow—was the dominant consideration, not the means of its ascertainment. The method, that is, "calculated on a $\frac{3}{8}$ -inch choke," was specified for the sole purpose of preventing injury to the well while the tests were being made.

As heretofore shown, the reports of Buck and Massey, by which petitioner is bound, conclusively establish that the well *was* capable of producing much in excess of 3000 barrels per day on open flow. It is respectfully submitted, therefore, that no substantial reason for a new trial on that issue has been advanced by petitioner.

Point B

Although the effect of the order granting certiorari in this case is to limit the argument to the single question whether a new trial should not have been granted, this Honorable Court has declared that it is not restrained thereby from considering any question presented by the record. *OLMSTEAD V. UNITED STATES*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944; *JUDICIAL CODE*, Sec. 240 (a) [28 U.S.C.A. Sec. 347 (a)].

It has frequently been held that on writ of certiorari to review a judgment of a circuit court of appeals, the entire record is before this Honorable Court, with power to review the action of the circuit court of appeals and direct such disposition as that court might have made upon the appeal from the district court. *LANGNES V. GREEN*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; *STORY PARCHMENT CO. V. PAT-*

PERSON PARCHMENT PAPER CO., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; DELK v. ST. LOUIS & S. F. R. CO., 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590; LUTCHER & M. LUMBER CO. v. KNIGHT, 217 U.S. 257, 30 S.Ct. 505, 54 L.Ed. 757; PANAMA RY. CO. v. NAPIER SHIPPING CO., 166 U.S. 280, 17 S.Ct. 572, 41 L.Ed. 1004. And the failure of respondents to apply for certiorari does not preclude this Honorable Court from considering whether the decree of a circuit court of appeals may be supported on a ground rejected or not decided by that court. LANGNES v. GREEN, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; PUBLIC SERVICE COMMISSION v. HAVEMEYER, 296 U.S. 506, 56 S.Ct. 360, 80 L.Ed. 357; TEXARKANA v. ARKANSAS-LOUISIANA GAS CO., — U.S. —, — S. Ct. —, 83 L. Ed. (Adv. Op. No. 9, p. 435); STORY PARCHMENT CO. v. PATERSON PARCHMENT PAPER CO., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; COLE v. RALPH, 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567.

Respondents earnestly submit that the decree of the Circuit Court of Appeals in the case at bar can be sustained on an independent ground of recovery which was presented to but not decided by that court and which appears as a matter of law from undisputed evidence in the record. If on that ground respondents are entitled to recover judgment as rendered by the Circuit Court of Appeals, the alleged errors complained of by petitioner, for review of which certiorari was granted, are immaterial and harmless, and constitute no substantial basis for granting a new trial.

On May 6, 1935, respondents made formal demand upon petitioner to comply with the option contract on the basis of a purchase price of \$400,000 (R. 155-157). By letter dated May 7, 1935, petitioner informed respondents that he unconditionally exercised the option given to him under the contract of February 6, 1935, to purchase the lease "for the applicable purchase price as fixed and determined by said con-

tract" (R. 197-198). The controversy between the parties over the purchase price is recognized in that letter (R. 197), and petitioner stated that notwithstanding the controversy he would pay \$200,000 in cash "with full reservation, however, of any and all rights which I have or may have under and by virtue of said agreement" (R. 197-198). Without acquiescing in petitioner's claimed reservation of rights, respondents prepared an assignment of the lease, *reciting a consideration of \$200,000 in cash and an oil payment of \$200,000 payable out of one fourth of seven eighths of the oil produced from the lease*, and deposited the assignment and drafts for the total cash consideration in the National Bank of Commerce of New Orleans, within the time and in the manner provided in the option contract (R. 136-139, 166-167). Petitioner *paid the drafts and accepted the assignment* on May 14, 1935 (R. 166-167), and *the assignment was filed for record in Iberia Parish* on May 15, 1935 (R. 139). Although petitioner filed suit against respondents as soon as he paid the drafts, seeking recovery for the claimed overpayment, and the full amount which he paid to the bank was immediately attached (R. 2-40), all except \$50,000 of the amount was voluntarily released by petitioner (R. 40-43); and after respondents had the case removed to the United States District Court petitioner *voluntarily dismissed his suit against them* (R. 74). By his answer to respondents' cross-bill, upon which the suit was tried below, petitioner claimed title to the lease solely by virtue of said assignment (R. 76-85). *Petitioner never at any time sought reformation of the assignment but has always asserted and still asserts title thereunder*. He wants to keep the lease without paying the consideration provided in the very instrument by which he acquired his title.

Such an inequitable result is prohibited by the universal principle that one who elects to accept the benefits accruing from a contract or deed is bound by the burdens flowing

therefrom. In *DOTY v. BERNARD*, 92 Tex. 104, 47 S.W. 712, the court approved the following statement of the doctrine:

"The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all of its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever."

In 21 C. J. 1208-1209, the principle is thus declared:

"A party to a transaction cannot ordinarily affirm it in part and in part disaffirm it. Thus with regard to rights claimed under a contract, deed, or mortgage, a party will not be allowed to assume the inconsistent position of affirming the contract in part and disaffirming it in part. Courts of equity proceed upon the theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it."

The decisions in Louisiana are in accord: *SHERER-GILLETT CO. v. BENNETT*, 153 La. 304, 95 So. 777; *LEWY v. WILKINSON*, 135 La. 105, 64 So. 1003; *SAVAGE v. WYATT LUMBER CO.*, 134 La. 627, 64 So. 491; *BUCKNER v. BEARD*, 32 La. Ann. 226; *SMITH v. ELLIOTT*, 9 Rob. 3; *CHANDLER & CHANDLER v. CITY OF SHREVEPORT* (La. App.) 162 So. 437.

When petitioner voluntarily dismissed his suit, the garnishment action ancillary thereto necessarily fell also (28 C.J. 272; 6 C.J. 284; 7 C.J.S. 444), and the \$50,000 held by the bank was payable at once to respondents. Petitioner thereafter paid to respondents only \$100,000 of the oil payment (R. 124), although the evidence is undisputed that from April 21, 1935, when the Bernard No. 3 well was completed as a producer to February 26, 1937, when the case was tried in the District Court, there had been produced from the lease 2,000,000 barrels of oil, or more, which petitioner has sold for prices ranging from \$0.90 to \$1.04 per barrel—much more than enough oil to pay the remainder of the oil payment (R. 95-96, 109-110, 163-164). *Under the very terms of the assignment by which he holds and claims title to the lease, therefore, petitioner is liable to respondents for \$100,000, which is admitted to be the balance of the oil payment now due and unpaid.*

Any other conclusion would condone the perpetration of a legal fraud. At the time petitioner paid the drafts and accepted the assignment his sole remedy under the option contract was to refuse to pay the drafts, refuse to accept the assignment as drawn, tender the amount of the purchase price which he claimed to be due, and then file suit for specific performance of the contract. Petitioner would not have been entitled to title and possession of the lease until he prevailed in a suit for specific performance, which, respondents confidently assert, he never could have done. Instead of pursuing that remedy he elected to pay the drafts, accept the assignment and take possession of the lease at once. In so doing he became conclusively bound by the terms of the assignment.

If petitioner did not intend to pay the consideration when he accepted the assignment which expressly obligated him to do so, a salutary principle of equity brands this act as fraud, and respondents would be entitled to rescission and cancellation of the assignment. CHICAGO, T. & M. C. RY. CO. v.

TITJERINGTON, 84 Tex. 223, 19 S.W. 472, 31 Am. St. Rep. 39; CEARLEY V. MAY, 106 Tex. 444, 167 S.W. 725; EDWARD THOMPSON CO. V. SAWYERS, 111 Tex. 374, 234 S.W. 873; WYATT V. CHAMBERS (Tex. Civ. App.), 182 S.W. 16. In WYATT V. CHAMBERS, *supra*, the court approved the following statement of the rule:

"Where a proposed grantee in order to procure a deed to real estate made promises and representations to the grantor that he would pay her \$700 in cash upon the delivery of the deed, and the grantor relying upon such promises and representations executed and delivered the deed to the grantee, when at the time of making said promises and representations said grantee made the same for the purpose of defrauding and deceiving the grantor, and had the intention at the time of not paying the promised cash payment, and never did pay the same, the grantee was guilty of such fraud as will authorize the cancellation of the deed."

In Louisiana, by Art. 2561, of the CIVIL CODE, the right to rescission is guaranteed to the seller, *irrespective of fraud*, where the buyer fails to pay the agreed consideration. Art. 2561 provides: "If the buyer does not pay the price the seller may sue for dissolution of the sale." GONSOULIN V. ADAMS, 28 La. Ann. 598; CHANDLER V. BURKHALTER, 10 L. App. 575, 121 So. 353 (where, as here, the consideration recited in the conveyance was never paid). And the seller may have rescission even after recovery of a judgment against the purchaser for the purchase price, if he is unable to collect his judgment. CANAL BANK V. COPELAND, 15 La. 75.

By his acts petitioner has acquiesced in respondents' understanding and interpretation of the contract and holds title to the lease under an assignment obligating him to pay a consideration of \$400,000 therefor. He has never at any time or

in any court sought reformation of the assignment. Therefore his liability to pay the consideration is fixed, and respondents are entitled to judgment against him for \$100,000.

" WHEREFORE, respondents pray that the writ of certiorari heretofore granted in this cause be dismissed as improvidently granted; in the alternative, respondents pray that the decree of the Circuit Court of Appeals be affirmed.

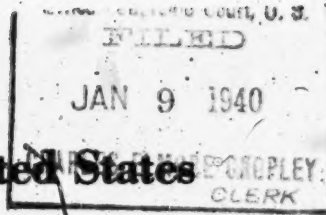
W. D. GORDON,
Of Counsel
Beaumont, Texas,

WM. N. BONNER,
Attorney for Respondents
Houston, Texas,

Dated November 1, 1939.

IN THE
Supreme Court of the United States

October Term, 1939.



No. 68

WILLIAM HELIS,

Petitioner,

versus

**MRS. ITASCA KINNEY WARD, as Executrix of the
Estate of Bryan Ward, Deceased, et al.,**

Respondents.

PETITION FOR REHEARING

and

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

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No. 68.

WILLIAM HELIS,
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versus

**MRS. ITASCA KINNEY WARD, as Executrix of the
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Respondents.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Comes now William Helis, petitioner herein, and presents this, his petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That this court erred in holding that the judgment of the Circuit Court of Appeals was predicated upon evidence which was without objection admitted at the trial.

II.

That this court erred in holding that the right of petitioner to attack the report of the umpire was a distinct and different ground of relief which petitioner failed to preserve or urge in his application to this court.

III.

That this court erred in holding that the attack by petitioner upon the umpire's report is an afterthought entitled to no consideration.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Eugene D. Saunders, counsel for the above named, William Helis, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EUGENE D. SAUNDERS.

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1939.

No. 68.

WILLIAM HELIS,
Petitioner,
versus

**MRS. ITASCA KINNEY WARD, as Executrix of the
Estate of Bryan Ward, Deceased, et al.,**
Respondents.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

The judgment rendered herein by your Honors is predicated upon three conclusions, viz.: (1) petitioner's complaint that the judgment of the Circuit Court of Appeals was founded on a theory not tried in the District Court and as to which all evidence had been excluded by the trial court is unjustified because the decision is predicated upon facts recited in the report of an umpire which was without objection admitted at the trial; (2) the right of petitioner to attack the report of the umpire was a distinct and different ground of relief which petitioner failed to preserve or urge in his application to this court;

and (3) petitioner's attack upon the umpire's report is an afterthought and hence does not support the complaint of a lack of due process of law.

We most earnestly, but respectfully, submit that your Honors have erred to the very great prejudice of petitioner upon each of these points.

**JUDGMENT OF CIRCUIT COURT OF APPEALS IS NOT
SUPPORTED BY ANY EVIDENCE ADMITTED
WITHOUT OBJECTION.**

In petitioner's application for this writ he stated the ground therefor as follows, p. 5:

"The decision of said Court of Appeals in directing the rendering of judgment on a theory which was not tried in the District Court and as to which all evidence was excluded by the trial judge so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

The writ was granted on this ground, limited to the question of whether a new trial should have been ordered.

Your Honors have found this ground of complaint to be unjustified because after the Circuit Court of Appeals determined that the contract between the litigants required the determination of the open flow capacity of the well

"* * * It then turned to the record and ascertained that Massey, the umpire, appointed pursuant to the

agreement of the parties, had found that by using the 3/8-inch choke as a base and 'building up therefrom by using other chokes to determine pressures and conditions' the well was capable of producing much in excess of three thousand barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, \$400,000.00. * * *

Your Honors have further said:

"* * * The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract."

Your Honors have fallen into an error of fact in stating that the results of the test made by Massey "were without objection admitted at the trial." Massey did not testify and his written report (R. 208) is a part of the transcript only because of having been annexed as an exhibit to the original petition filed by petitioner (Tr. p. 8). It was never offered in evidence by either of the litigants and hence comprises no part of the evidence submitted by them for the determination of their controversy.

Had the report of Massey been offered in evidence by respondents and had petitioner failed to object thereto we could understand that petitioner might now find himself bound by everything contained in that report, notwith-

standing the ruling of the District Court specifically excluding all other evidence tending to show the open flow capacity of the well. We most earnestly submit, however, that this petitioner cannot be bound by everything contained in a report which was never formally offered in evidence and as to which he was never afforded the opportunity to object. Particularly can he not be bound by such a report when he has by his pleadings shown that he would have assailed it (R. 8, 9) had it been used by his opponents.

Neither petitioner nor respondents contended that the report of Massey was that of an umpire whose decision was binding upon them and determinative of their differences. Respondents, in their pleadings, merely alleged that they stood ready to prove that the well was "capable of producing, within the terms and specifications of said contract, an amount greatly in excess of 3000 barrels of oil per day" (R. p. 66). Upon the trial of the case respondents sought to prove their contentions by the testimony of their employee, Buck, but the trial court maintained petitioner's objection to Buck giving any testimony to support the contentions of respondents. Respondents neither pleaded nor relied upon the report of Massey. So much so that they did not even offer that report in evidence. Petitioner, while annexing a copy of Massey's report to his petition, specifically assailed it as the report of an umpire (R. 8, 9) and the record affirmatively shows that petitioner did not offer it in evidence (R. 135).

In view of the foregoing facts we most respectfully submit that your Honors have erred in holding that the

report of Massey was admitted without objection upon the trial and that the Circuit Court of Appeals was justified in predicating its judgment upon statements contained therein.

RIGHT TO ATTACK REPORT OF UMPIRE IS NOT A DISTINCT GROUND OF RELIEF WHICH PETITIONER DID NOT PRESERVE OR URGE IN APPLICATION FOR THIS WRIT.

Your Honors have found that the right of petitioner to attack the umpire's report is a separate ground of relief and not embraced in his complaint that he has been deprived of his day in court. We submit that this conclusion is erroneous although a natural consequence of your finding that evidence had been admitted without objection which supported the judgment of the Circuit Court of Appeals.

The record in this case shows beyond any possibility of a doubt that the appellate court has rendered judgment on a theory never litigated by the parties. It is entirely clear that neither of the parties was permitted by the trial court to introduce any evidence to support a judgment on that theory. It is equally and absolutely certain that the theory of the Circuit Court of Appeals cannot be applied to the record as presently composed with the slightest assurance of accomplishing justice between the parties.

Notwithstanding the foregoing we recognize that litigation must proceed according to certain rules and that

petitioner would be in no position to complain of the injustice of the procedure followed in this case if any act of his or his counsel is responsible therefor. If petitioner had permitted the report of Massey to be filed in evidence without objection he would have known that there was evidence in the record which might support an adverse decision. In such event petitioner would have been required to complain that there had not been a full and fair trial of the new issue; not that there had been no trial whatever. He might have been required to specifically request that he be afforded the opportunity to introduce evidence in support of the allegations of his petition (R. 8, 9) attacking the umpire's report.

What actually occurred, however, was that petitioner specifically attacked the umpire's report in his petition and, in connection with these allegations, attached a copy of the report to his petition. Respondents never even referred to this report in their pleadings. They did not produce Massey as a witness and they did not offer his report in evidence. Their failure to offer the report in evidence was no oversight because counsel for respondents specifically asked counsel for petitioner if counsel for petitioner was offering any correspondence from Massey and though answered in the negative (R. 135) counsel for respondents made no effort to do so.

Under these circumstances, we submit, petitioner was fully justified in believing and acting upon the supposition that he was fully protected by the ruling of the trial court excluding all evidence as to the open flow capacity of the well. There having been no trial of that issue and no

evidence introduced relative thereto there could not be any judgment rendered thereon.

Your Honors have said that petitioner should have requested the remand of the case to permit him to attack the umpire's report and that having failed so to do and not having requested this writ on that ground he has lost any right he may have had. But, we most earnestly submit, your Honors are in error on this point. Petitioner had to found his complaint on the error actually made by the court which was the deciding of the case upon a theory urged but not tried in the court below and upon evidence not filed and relied upon by the parties. When this error was directed to the court's attention it might have either concluded that the judgment should be affirmed for want of evidence to support a reversal or that the case should be remanded for further trial. The only important point at this time is that petitioner did complain of the error actually committed by the court and has, on the ground of that same error, applied for redress to this court.

Persons may contract that an umpire shall be designated to settle a particular controversy which may arise in the future. If, however, both are dissatisfied with the decision of the umpire and neither sees fit to rely upon it their controversy would be determined upon the basis of the evidence which each presented to the court. So, in the instant case. Petitioner disavowed the umpire's report in his initial pleading. Respondents, for reasons which they evidently considered sufficient, did not plead the umpire's decision as determinative of the controversy and undertook to maintain their contentions by other evidence

which was excluded by the trial court. Neither litigant offered the umpire's report in evidence.

If petitioner had requested that the case be remanded to enable him to attack the umpire's report he would necessarily have consented to the judgment being predicated solely upon a report which neither he nor his opponents had been willing to accept and which neither had offered in evidence. He would thereby have rectified the very error which had caused his injury and would no longer have been in a position to urge that he had been deprived of his day in court.

We submit that petitioner did all that could possibly have been expected of him when he directed the attention of the appellate court to the fact that its decision was predicated upon facts not contained in the record. It was then incumbent upon the Circuit Court of Appeals to either render such judgment as was justified by the facts contained in the record or to remand the case to permit the taking of evidence upon any points which it regarded as necessary for the decision of the case.

PETITIONER IS NOT URGING AFTERTHOUGHT.

Your Honors have said that petitioner presents an afterthought when he urges that the report of the umpire is subject to attack. We respectfully submit that the record is conclusive proof of the contrary.

In his initial pleading petitioner attacked this report (R. 8, 9) in anticipation of its being offered and relied upon by respondents. When respondents did not see fit to use the report it was unnecessary for petitioner to follow up these allegations with proof of the errors rendering this report worthless. Had this report become an issue in the case petitioner was prepared with allegation and proof to show its complete worthlessness.

It is true that petitioner did not, in his application for rehearing, specifically request an opportunity to attack the umpire's report. This was not done for the reason, hereinabove set forth, that petitioner did not believe that his defense should be so limited. He believed that his rights consisted in having the court follow the customary procedure of either deciding the case upon the then existing record or remanding the case for retrial under the theory established by the appellate court.

In a serious effort to follow the rules established by your Honors petitioner eliminated from his application for this writ everything not essential to the presentation of the single issue which he sought to raise. He did not think it necessary to impose upon your Honors the burden of considering the nature of his defense. He believed that your interest would be confined to the fact that he had been deprived of any opportunity, through no fault of his, to present any defense, without regard to the nature or merit thereof.

In conclusion we most respectfully submit that your Honors should in this case apply the rule enunciated by

you in the case of *Duke Power Co. v. Greenwood County*, 229 U. S. 259, wherein you said, p. 268:

"Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

No harm could possibly result from requiring that this case be remanded for a new trial. Grave injustice may and will result if there is permitted to become executory a judgment which is founded on an unlitigated theory and predicated solely upon an umpire's report which neither litigant regarded as worthy of being offered in evidence.

For the foregoing reasons we respectfully request that a rehearing herein be granted and that after further consideration the case be ordered remanded to the District Court for further trial.

Respectfully submitted,
EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

p. 3

SUPREME COURT OF THE UNITED STATES.

No. 68.—OCTOBER TERM, 1939.

William Helis, Petitioner,

vs.

Mrs. Itasca Kinney Ward, as Executrix
of the Estate of Bryan Ward, De-
ceased, et al.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Fifth Circuit.

[December 18, 1939.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a suit for specific performance of a contract to purchase a mineral lease brought by respondents, as vendors. The contract price was to be determined pursuant to a formula based upon the production of certain designated wells on the property. That price was fixed at \$300,000 "if the average daily production of said wells for a period of fifteen days after completion is less than 3,000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells." In case the production, calculated in that manner, was more than 3,000 barrels per day, the purchase price was fixed at \$400,000. The test was to be made jointly by a representative of respondents and a representative of petitioner; and "in the event they fail to agree on the proper gauge", it was provided that "Judge Hardin will appoint a reputable engineer to act as umpire."

The parties failed to agree on the proper gauge and Judge Hardin appointed W. L. Massey, a petroleum engineer, to make the test.¹ Massey conducted a test and submitted a written report, which without objection was admitted at the trial. That report stated that although "the well will not make 3,000 barrels per day on such 3/8" choke", it was "capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke." At the trial there was other testimony that the production "through a 3/8-inch

¹ Judge Hardin instructed Massey: "You are requested to determine, first, the actual production of three-eighths (3/8) choke; second, by using the three-eighths (3/8) choke you are to calculate the open flow capacity of the well."

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choke" was not more than 3,000 barrels a day. The trial court held that the contract meant that the well was to be flowed through a 3/8-inch choke. Accordingly it dismissed the bill, since on that interpretation it was clear that the production was not more than 3,000 barrels a day and since petitioner already had paid \$300,000. On appeal, the Circuit Court of Appeals held that the test provided in the contract "was not to measure the production through a 3/8-inch choke, but to calculate on a 3/8-inch choke the amount the well was capable of producing." It then turned to the record and ascertained that Massey, the umpire appointed pursuant to the agreement of the parties, had found that by using the 3/8-inch choke as a base and "building up therefrom by using other chokes to determine pressures and conditions" the well was capable of producing much in excess of 3,000 barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, \$400,000. It accordingly reversed the judgment directing the District Court to enter judgment for respondents for \$100,000, the balance due under the contract, with interest. We granted certiorari, limited to the question whether a new trial should not have been granted, on the assertion that the failure to remand for a new trial deprived petitioner of his day in court in violation of the rule of *Saunders v. Shaw*, 244 U. S. 317.

We conclude that the Circuit Court of Appeals committed no error.

The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders v. Shaw*, *supra*. The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract. To be sure, petitioner now asserts that on a new trial he would attack the competency and accuracy of the umpire's report—matters which were immaterial to the issues on the trial in view of the fact that it was not contested that no more than 3,000 barrels of oil a day could be produced through a 3/8-inch choke. But the difficulty with peti-

tioner's position is that he has not preserved that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report.² Nor was that the ground upon which the petition for certiorari was predicated. For review by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. There was no intimation in the petition for certiorari that a new trial should be granted in order to afford petitioner an opportunity to attack the competency and accuracy of the umpire's report. It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. *Clark v. Williard*, 294 U. S. 211, 216; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 498; *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 146. Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the ~~Fourteenth~~ Amendment. Due process of law is not concerned with mere after-thoughts.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

² In addition to attacking the interpretation of the contract by the Circuit Court of Appeals, petitioner merely asserted, "Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record."